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N. Y. Court of Appeals.

REPORT

OF THE

LEMMON SLAVE CASE.

New York (State)

CONTAINING

POINTS AND ARGUMENTS OF COUNSEL ON BOTH
SIDES, AND OPINIONS OF ALL THE JUDGES.

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IN THE COURT OF APPEALS FOR THE STATE OF
NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,
ON THE RELATION OF LOUIS NAPOLEON,

RESPONDENTS,

AGAINST

JONATHAN LEMMON,

A CITIZEN OF THE STATE OF VIRGINIA,

APPELLANT.

CHESTER A. ARTHUR, *Attorney for the People.*

WILLIAM M. EVARTS, }
JOSEPH BLUNT, } *Of Counsel.*
E. D. CULVER, }

H. D. LAPAUGH, *Attorney for Appellant.*

CHARLES O'CONOR, *Of Counsel.*

HISTORY OF THE CASE.

In November, 1852, Jonathan Lemmon and Juliet, his wife, having been before that time, citizens and residents of the State of Virginia, brought eight colored persons, who had been held as slaves of Juliet Lemmon, pursuant to the laws of that State, into the port of New York, for the purpose of taking them to Texas, to be there retained as slaves.

They had adopted, as their mode of travel, for the whole party, the steamer from Norfolk to New York, with the intention of remaining in New York only until a proper vessel could be obtained, to continue their journey. Meantime the slaves were landed and conveyed to a boarding-house at No. 8

Carlisle street, where they were discovered by a colored man named Louis Napoleon, who thereupon presented a petition to the Hon. Elijah Paine, then one of the Justices of the Superior Court of the city of New York, for a writ of Habeas Corpus, for the production of the colored persons before him, to inquire into the cause of their detention.

The petition presented was as follows :

To any Justice of the Supreme Court of the State of New York, or to any Judge of the Superior Court of the City of New York :

The petition of Louis Napoleon shows, that seven colored persons, a man, two females, and four children, whose names are unknown, are, and each of them was yesterday confined, and restrained of their liberty, on board the steamer Richmond City, or "City of Richmond," so called, in the harbor of New York, and taken therefrom last night, and are now confined in house No. 5 Carlisle street, in New York, and that they are not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree. That the cause or pretence of such detention or restraint, according to the best of the knowledge and belief of your petitioner, is, that said persons so restrained, are held under pretence that they are slaves; and that they have, as your petitioner is informed and believes, been bought up by a negro trader or speculator called Lemmings, by whom, together with the aid of the man keeping the house, whose name is unknown, and of an agent of said Lemmings, whose name is unknown, and in whose custody they were left as such agent, they are held and confined therein, and that the said negro trader intends very shortly to ship them for Texas, and there to sell and reduce them to slavery; and that the illegality of their restraint and detention consists in the fact, as your petitioner is advised and believes, that they are not slaves, but free persons, and entitled to their freedom. That your petitioner cannot have access to them, to have them sign a petition; but they desire their freedom, and are unwilling to be taken to Texas, or into slavery; and that their place of destination has been changed since the papers issuing herein.

Wherefore your petitioner prays, that a writ of Habeas Corpus issue, directed to said Lemmings and the keeper of said house, whose name is unknown, commanding them to have the body of each of said persons above mentioned, and so confined as aforesaid, before Elijah Paine, one of the Justices of the New York Superior Court.

Dated sixth day of November, 1852.

His
LOUIS + NAPOLEON.
mark.

A writ of Habeas Corpus was allowed on the foregoing petition by Mr. Justice Paine, on the sixth day of November, 1852, and the eight colored persons were thereupon brought up before him, viz.: Emeline, aged twenty-three; Nancy, aged twenty; Lewis, brother of Emeline, aged sixteen; Edward, brother of Emeline, aged thirteen years; Lewis and Edward, twins, boys of Nancy, aged seven years; Ann, daughter of Nancy, aged five years, and Amanda, daughter of Emeline, aged two years.

Mr. Lemmon made the following return to the writ :

Jonathan Lemmon, respondent, above named, for return to the writ of Habeas Corpus issued herein, states and shows, that the eight slaves or persons, named in said writ of Habeas Corpus, are the property and slaves of Ju-

liet Lemmon, the wife of this respondent, for whom they are held and retained by this respondent.

That the said Juliet has been the owner of such persons as slaves for several years last past, she being a resident and citizen of the State of Virginia, a slaveholding State.

That under and by virtue of the constitution and the laws of the State of Virginia, the aforesaid eight persons, for several years last past, have been and now are held or bound to service or labor as slaves, such service or labor being due by them as such slaves to the said Juliet, under and by virtue of the constitution and laws aforesaid.

That the said Juliet with her said slaves, persons or property, is now *in transitu*, or transit, from the State of Virginia aforesaid to the State of Texas, the ultimate place of destination, and another slaveholding State of the United States of America, and that she was so on her way *in transitu*, or transit, and not otherwise, at the time when the aforesaid eight persons or slaves were taken from her custody and possession, on the 6th day of November instant, and brought before the said Superior Court of the City of New York, or one of the justices thereof, under the writ of Habeas Corpus herein.

That by the constitution and the laws of the State of Texas aforesaid, the said Juliet is and would be entitled to the said slaves, and to the service or labor of the said slaves or persons in like manner as they are guaranteed and secured to her by the constitution and the laws of the State of Virginia aforesaid.

That the said Juliet never had any intention of bringing the said slaves or persons into the State of New York to remain therein, and that she did not bring them into said State in any manner nor for any purpose whatever, except *in transitu*, or transit from the State of Virginia aforesaid, through the port or harbor of New York, on board of steamship, for their place of destination, the State of Texas aforesaid.

That the said Juliet, as such owner of the aforesaid slaves or persons, was, at the time they were taken from her, as aforesaid, on the writ of Habeas Corpus, and she thereby deprived of the possession of them, passing with them through the said harbor of New York, where she was compelled by necessity to touch or land, without on her part remaining, or intending to remain longer than necessary.

That the said slaves have not been bought up by a negro trader or speculator, and that the allegation to that effect, made in the petition of one Louis Napoleon, above named, is entirely untrue; that the said Juliet is not, and never was a negro trader, nor was, nor is, this respondent one.

That the said persons or slaves were inherited or received by said Juliet Lemmon, as heir at law, descendant or devisee of William Douglass, late of Bath County, in the State of Virginia, aforesaid.

That it is not, and never was, the intention of the said Juliet to sell the said slaves, as alleged in the petition of the relator, or to sell them in any manner.

This respondent further answering, denies, that the aforesaid eight persons are free, but on the contrary shows that they are slaves as aforesaid, to whom, and to whose custody and possession the said Juliet is entitled. Respondent further shows, that the said slaves, sailing from the port of Norfolk, in the said State of Virginia, on board the steamship Richmond City, never touched, landed, or came into the harbor or State of New York, except for the mere purpose of passage and transit from the State of Virginia aforesaid to the State of Texas aforesaid, and for no other purpose, intention, object or design whatever.

That the said Juliet with her said slaves was compelled by necessity or accident, to take passage in the steamship City of Richmond, before named, from the aforesaid port of Norfolk and State of Virginia for the State of Texas aforesaid, the ultimate place of destination.

That the said slaves are not confined or restrained of their liberty, against their will, by this respondent, or the said Juliet, or by any other one on her behalf.

JONATHAN LEMMON.

Subscribed and sworn before me, this }
9th day of November, 1852. }

E. PAINE.

HENRY D. LAPAUGH,
Attorney and Counsel for the respondent, Jonathan Lemmon.

To this return the relator orally interposed a general demurrer, on the ground that the facts stated in it, did not constitute a legal cause for the restraint of the liberty of the colored persons.

The case was heard upon the questions of law thus raised.

E. D. Culver and John Jay appeared as counsel for the petitioners: H. D. Lapaugh and Henry L. Clinton for the respondent.

The argument is fully reported in 5 Sandford, 681 (N. Y. Superior Court).

After argument, Justice Paine, by his final order, dated November 13, 1852, liberated the slaves from custody. Upon rendering this decision, he delivered the following opinion:

OPINION OF MR. JUSTICE PAINE.

This case comes before me upon a writ of Habeas Corps issued to the respondent, requiring him to have the bodies of eight colored persons, lately taken from the steamer City of Richmond, and now confined in a house in this city, before me, together with the cause of their imprisonment and detention.

The respondent has returned to this writ, that said eight colored persons are the property of his wife, Juliet Lemmon, who has been their owner for several years past, she being a resident of Virginia, a slaveholding State, and that by the constitution and laws of that State, they have been, and still are, bound to her service as slaves; that she is now, with her said slaves or property, *in transitu* from Virginia to Texas, another slaveholding State, and by the constitution and laws of which she would be entitled to said slaves and to their service; that she never had any intention of bringing, and did not bring them into this State to remain or reside, but was passing through the harbor of New York, on her way from Virginia to Texas, when she was compelled by necessity to touch or land, without intending to remain longer than was necessary. And she insists, that said persons are not free, but are slaves as aforesaid, and that she is entitled to their possession and custody.

To this return the relator has put in a general demurrer.

I certainly supposed, when the case was first presented to me, that, as there could be no dispute about the facts, there would be no delay or difficulty in disposing of it. But, upon the argument, the counsel for the respondent cited several cases which satisfied me, that this case could not be decided until those had been carefully examined.

The principle which those cases tend more or less forcibly to sustain, is, that if an owner of slaves is merely passing from home with them, through a free State into another slave State, without any intention of remaining, the slaves, while in such free State, will not be allowed to assert their freedom. As that is precisely the state of facts constituting this case, it becomes necessary to inquire whether the doctrine of those cases can be maintained upon general principles, and whether the law of this State does not differ from the laws of those States where the decisions were made.

I shall first consider whether those cases can be sustained upon general principles.

The first case of the kind which occurred, was that of *Sewall's Slaves*, which was decided in Indiana in 1829, by Judge Morris, and will be found reported in 8 Am. Jurist. 404. The return to the habeas corpus stated, that Sewall resided in Virginia, and owned and held the slaves under the laws of that State, that he was emigrating with them to Missouri, and on his way was passing through Indiana, when he was served with the habeas corpus.

It however appeared on the hearing, that Sewall was not going to Missouri to reside, but to Illinois, a State whose laws do not allow of slavery. The judge for this reason discharged the slaves. This case, therefore, is not in point, and would be entirely irrelevant to the present, were it not for a portion of the judge's opinion, which was not called for by the case before him, but applies directly to the case now before me.

"By the law," he says, "of nature and of nations (Vattel, 160), and the necessity and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the States of this Federative Republic, I have no doubt but the citizen of a slave State has a right to pass, upon business or pleasure, through any of the States, attended by his slaves or servants; and while he retains the character and rights of a citizen of a slave State, his rights to retain his slaves would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free State, should be considered as an escape from the State where the master had a right of citizenship, and by the laws of which the service of the slaves was due. The emigrant from one State to another might be considered prospectively as the citizen or resident of the State to which he was removing; and should be protected in the enjoyment of those rights he acquired in the State from which he emigrated, and which are recognized and protected by the laws of the State to which he is going. But this right, I conceive, cannot be derived from any provision of positive law."

The next case relied upon is *Willard vs. the people* (4 Scammon's Reports, 461) and which was decided in the State of Illinois in 1843. It was an indictment for secreting a woman of color, owing service to a resident of Louisiana. The indictment was under the 149th section of the Criminal Code, which provides that "if any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave, or servant owing service or labor, to any other persons, whether they reside in this State or in any other State or Territory or District, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every such person so offending shall be deemed guilty of misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

It appeared that the woman of color was a slave, owned by a resident of Louisiana, and that, while passing with her mistress from Kentucky to Louisiana, through the State of Illinois, she made her escape in the latter State, and was secreted by the defendant.

There were several questions raised in the case which it is unnecessary now to notice. The indictment, which was demurred to, was sustained by the court. The main objection to it was, that the section of the code under which it was found, was a violation of the sixth article of the constitution of the State of Illinois, which declares that "neither slavery nor involuntary servitude shall hereafter be introduced into this State, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

The court, in answer to this objection, say: The only question, therefore, is the right of transit with a slave; for if the slave upon entering our territory, although for a mere transit to another State, becomes free under the constitution, then the defendant in error is not guilty of concealing such a person as is described in the law and in the indictment. The 149th section

of the criminal code, for a violation of which the plaintiff is indicted, does most distinctly recognize the existence of the institution of slavery in some of these United States, and whether the constitution and laws of this State have or have not provided adequate remedies to enforce within its jurisdiction that obligation of service, it has provided by this penal sanction, that none shall harbor or conceal a slave within this State, who owes such service out of it. Every state or government may or may not, as it chooses, recognize and enforce this law of comity. And to this extent this State has expressly done so. If we should, therefore, regard ourselves as a distinct and separate nation from our sister States, still, as by the law of nations (Vattel, b. 2, ch. 10, s. 132, 133, 134), the citizens of one government have a right of passage through the territory of another peaceably, for business or pleasure, and that, too, without the latter's acquiring any right over the person or property (Vattel, b. 2, s. 107, 109), we could not deny them this international right without a violation of our duty. Much less could we disregard their constitutional right, as citizens of one of the States, to all the rights, immunities and privileges of citizens of the several States. It would be startling, indeed, if we should deny our neighbors and kindred that common right of free and safe passage which foreign nations would hardly dare deny. The recognition of this right is no violation of our constitution. It is not an introduction of slavery into this State, as was contended in argument, and the slave does not become free by the constitution of Illinois, by coming into the State for the mere purpose of passing through it."

Another case cited by the respondent's counsel, was the Commonwealth *vs.* Ayres, 18 Pickering's Rep., 193. In this case, the owner brought her slave with her from New Orleans to Boston, on a visit to her father, with whom she intended to spend five or six months, and then return with the slave to New Orleans. The slave being brought up on Habeas Corpus, the court ordered her discharge. The case was fully argued, and Chief Justice Shaw closes a most elaborate opinion with these words: "Nor do we give an opinion upon the case, where an owner of a slave in one State is *bonâ fide* removing to another State where slavery is allowed, and in so doing necessarily passes through a free State, or where by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary."

I have quoted largely from the opinions in these cases, in order that it may be understood clearly what is presented by them as their governing principle. The respondent's counsel insists it is this: That by the law of nations, an owner of a slave may, either from necessity or in the absence of all intention to remain, pass with such slave through a State where slavery is not legalized, on his way from one slave State to another, and that during such transit through the free State, the slave cannot assert his freedom.

I admit this is the principle of these cases, and I now propose to consider it. Each case denies, that the right of transit can be derived from the provision of the Constitution of the United States respecting fugitive slaves, and where an opinion was expressed, places the right upon the law of nations.

Writers of the highest authority on the law of nations agree that strangers have a right to pass with their property through the territories of a nation. (Vattel, b. 2, ch. 9, ss. 123 to 126. Puffendorf, b. 3, ch. 3, ss. 5 to 10). And this right, which exists by nature between States wholly foreign to each other, undoubtedly exists, at least as a natural right, between the States which compose our Union.

But we are to look further than this, and to see what the law of nations is, when the property which a stranger wishes to take with him, is a slave.

The property which the writers on the law of nations speak of, is merchandise, or inanimate things. And by the law of nature these belong to their owner. But those writers nowhere speak of a right to pass through a foreign country with slaves as property. On the contrary, they all agree that by the law of nature alone no one can have a property in slaves. And they also

hold that, even where slavery is established by the local law, a man cannot have that full and absolute property in a person which he may have in an inanimate thing. (Puffendorf, b. 6, ch. 3, s. 7.) It can scarcely, therefore, be said, that when writers on the law of nations maintain, that when strangers have a right to pass through a country with their merchandise or property, they thereby maintain their right to pass with their slaves.

But the property or merchandise spoken of by writers on the law of nations, which the stranger may take with him, being mere inanimate things, can have no rights; and the rights of the owner are all that can be thought of. It is, therefore, necessary to look still further, and to see what is the state of things, by the law of nature, as affecting the rights of the slaves, when an owner finds himself, from necessity, with his slave in a country where slavery is not legalized or is not upheld by law.

It is generally supposed that freedom of the soil from slavery is the boast of the common law of England, and that a great truth was brought to light in *Somerset's case*. This is not so. Lord Mansfield was by no means, so far as the rest of the world is concerned, the pioneer of freedom. Whatever honor there may be in having first asserted, that slavery cannot exist by the law of nature, but only by force of local law, that honor, among modern nations, belongs to France, and among systems of jurisprudence, to the civil law. The case of *Somerset* did not occur until the year 1772, and in 1738, a case arose in France, in which it was held that a negro slave became free by being brought into France. (13 *Causés Célèbres*, 49.)

But in truth, the discovery that by nature all men are free, belongs neither to England nor France, but is as old as ancient Rome; and the law of Rome repeatedly asserts, that all men by nature are free, and that slavery can subsist only by the laws of the State. (Digests, B. 1, T. 1, s. 4; B. 1, T. 5, ss. 4, 5.)

The writers on the law of nations uniformly maintain the same principle, viz.: that by the law of nature all men are free; and that where slavery is not established and upheld by the law of the State, there can be no slaves. (Grotius, b. 2, ch. 22, s. 11. Hobbes de Cive, b. 1, ch. 1, s. 3. Puffendorf (*Barbeyrac*), *Droit de la Nature*, b. 3, ch. 2, ss. 1, 2; b. 6, ch. 3, s. 2.)

The same writers also hold that by the law of nature one race of men is no more subject to be reduced to slavery than other races. (Puffendorf, b. 2, ch. 3, s. 8.)

When we are considering a master and slave in a free State, where slavery is not upheld by law, we must take into view all these principles of the law of nature, and see how they are respectively to be dealt with according to that law; for it will be remembered, that the master can now claim nothing except by virtue of the law of nature. He claims under that law a right to pass through the country. That is awarded to him. But he claims in addition to take his slave with him. But upon what ground? That the slave is his property. By the same law, however, under which he himself claims, that cannot be; for the law of nature says that there can be no property in a slave.

We must look still further to see what is to be done with the claims of the slave.

There being now no law but the law of nature, the slave must have all his rights under that, as well as the master, and it is just as much the slave's right under that, to be free, as it is the master's to pass through the country. It is very clear, therefore, that the slave has a right to his freedom, and that the master cannot have a right to take him with him.

As the cases cited by the respondent's counsel all rest the master's right of property exclusively upon the law of nations, and admit that he cannot have it under any other law, I have thus followed out that view, perhaps, at unnecessary length, in order to see to what it would lead. In order to prevent any misapprehension as to the identity of the law of nature and the law of nations, I will close my observations upon this part of the case with

a citation, upon that point, from Vattel (Preliminaries, s. 6). "The law of nations is originally no more than the law of nature applied to nations."

I ought also to notice here, that the respondent's counsel, upon the authority of the case in Illinois, insisted that this right of transit with slaves, is strengthened by that clause in the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The case in Indiana, on the other hand, says expressly, that the right does not depend upon any positive law.

I think this remark must have found its way into the opinion of the judge, who decided the Illinois case, without due consideration. I have always understood that provision of the Constitution to mean (at least, so far as this case is concerned) that a citizen who was absent from his own State, and in some other State, was entitled, while there, to all the privileges of the citizens of that State, and I have never heard of any other or different meaning being given to it. It would be absurd to say that while in the sister State he is entitled to all the privileges, secured to citizens by the laws of all the several States or even of his own State; for that would be to confound all territorial limits, and give to the States, not only an entire community, but a perfect confusion of laws. If I am right in this view of the matter, the clause of the Constitution relied upon, cannot help the respondent; for if he is entitled while there, to those privileges only, which the citizens of this State possess, he cannot hold his slaves.

I must also here notice some other similar grounds insisted upon by the respondent's counsel.

He cites Vattel (B. 2, ch. 8, s. 81) to prove that the goods of an individual, as regards other States, are the goods of his State. I have already shown that by the law of nature, about which alone Vattel is always speaking, slaves are not goods: and I may add, that what Vattel says in the passage to which he refers, has no connection with the right of transit through a foreign country. Besides, in the case from Illinois referred to by respondent's counsel, the Court distinctly declare (*Willard vs. People*, 4. *Scammon's Rep.* 471) that they "cannot see the application to this case of the law of nations, in relation to the domicile of the owner fixing the condition of, and securing the right of property in this slave, and regarding the slave as a part of the wealth of Louisiana, and our obligation of comity to respect and enforce that right."

The respondent's counsel also refers to those provisions of the Constitution of the United States which relate to fugitive slaves and to the regulation of commerce among the several States. With regard to the first of these provisions, which the counsel insists recognizes and gives a property in slaves, it is sufficient to say, that although the supreme law of the land, in respect to fugitive slaves, and as such, entitled to unquestioning obedience from all, it is, so far as everything else is concerned, the same as if there were no such provision in the Constitution. This has been so held in cases almost without number, and is held in each of the three cases cited by the respondent's counsel, and upon which I have before commented.

As for the provision of the Constitution in relation to commerce among the States, it has been often held, that notwithstanding this provision, the States have the power impliedly reserved to them of passing all such laws as may be necessary for the preservation within the state, of health, order, and the well-being of society, or laws which are usually called sanative and police regulations. (*Passenger cases*, 7 *Howard*, S. O. R. 283. *License cases*, 5 *Ib.* 504. *Blackbird Creek Marsh Company*, 2 *Peters*, 250. *New York vs. Milo*, 11 *Peters*, 130. *Brown vs. State of Maryland*, 12 *Wheat.* 419. *Groves vs. Slaughter*, 15 *Peters*, 511.) Laws regulating or entirely abolishing slavery, or forbidding the bringing of slaves into a State belong to this class of laws, and a right to pass those laws is not affected by the Constitution of the United States. This view of the subject is taken

by the three cases upon which the counsel mainly relies. And even if all this were not so, I apprehend that the Constitution having undertaken to regulate both external and internal commerce in slaves, by certain distinct and specific provisions (viz.: those in relation to the importation of slaves from abroad, and the return of fugitive slaves), has thereby taken the element of slavery out of these general provisions in relation to commerce, and having legislated separately upon the subject of slavery to a very limited extent and there stopped, has thereby shown its intention to dispose separately and completely of that subject, so far as it was to be disposed of, and has not left to Congress any power over it under the general provisions relating to commerce. For under any other view of the subject, the provisions in relation to the importation of slaves, and to fugitive slaves, would be entirely superfluous. If the Constitution had intended to give Congress power over slavery by the general provision in relation to commerce, that provision is of itself quite sufficient by its letter or term, to enable Congress to do all that they are specially empowered to do by the clauses expressly relating to slavery; and as an express power takes away a power which otherwise might be tacitly implied, I think it has clearly done so in this instance.

It remains for me to consider how far the local law of New York affects this case, and distinguishes it from the cases in Indiana and Illinois.

To go back first to the right of transit with slaves, as it is claimed to exist by the natural law. It appears to be settled in the law of nations, that a right to transit with property not only exists, but that where such a right grows out of a necessity created by the *vis major*, it is a perfect right, and cannot be lawfully refused to a stranger. (Vattel, B. 2., ch. 9, s. 123. Ib. Preliminaries, s. 17. Puffendorf, B. 3, ch. 3, s. 9.) In this case, it is insisted that the respondent came here with his slaves from necessity, the return having so stated, and the demurrer admitting that statement. It is perfectly true that the demurrer admits whatever is well pleaded in the return. But if the return intended to state a necessity created by the *vis major*, it has pleaded it badly, for it only alleges a necessity, without saying what kind of necessity; and as it does not allege a necessity created by the *vis major*, the demurrer has not admitted any such necessity. Where the right of transit does not spring from the *vis major*, the same writers agree that it may be lawfully refused. (Ib.)

But, however this may be, it is well settled in this country, and so far as I know has not heretofore been disputed, that a State may rightfully pass laws, if it chooses to do so, forbidding the entrance or bringing of slaves into its territory. This is so held even by each of the three cases, upon which the respondent's counsel relies. (Commonwealth *vs.* Ayres, 18 Pick. R. 221. Willard *vs.* the People, 4 Scammon's Rep., 471. Case of Sewall's slaves, 3 Am. Jurist. 404.)

The laws of the State of New York upon this subject appear to me to be entirely free from any uncertainty. In my opinion they not only do not uphold or legalize a property in slaves within the limits of the State, but they render it impossible that such property should exist within those limits, except in the single instance of fugitives from labor, under the Constitution of the United States.

The Revised Statutes (vol. 1, 656, 1st Ed.) reenacting the law of 1817, provide that "No person held as a slave shall be imported, introduced or brought into this State, on any pretence whatever, except in the cases herein after specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought into the State contrary to the laws in force at the time shall be free." (S. 1.)

The cases excepted by this section are provided for in the six succeeding sections. The second section excepts fugitives under the Constitution of the United States; the third, fourth and fifth sections, except certain slaves belonging to immigrants, who may continue to be held as apprentices; the

seventh section provides, that families coming here to reside temporarily, may bring with them and take away their slaves; and the sixth section contains the following provision:

"Any person not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held by him in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months, and if such residence be continued beyond that time, such person shall be free."

Such was and always had been the law of this State, down to the year 1841. The legislature of that year passed an act amending the Revised Statutes, in the following words, viz.: "The 3d, 4th, 5th, 6th and 7th sections of Title 7, Chapter 20, of the 1st part of the Revised Statutes, are hereby repealed."

The 6th section of the Revised Statutes, and that alone contained an exception which would have saved the slaves of the respondent from the operation of the 1st section. The Legislature, by repealing that section, and leaving the first in full force, have, as regards the right of these people and of their master, made them absolutely free; and that not merely by the legal effect of the repealing statute, but by the clear and deliberate intention of the Legislature. It is impossible to make this more clear than it is by the mere language and evident objects of the two acts.

It was, however, insisted on the argument, that the words "imported, introduced or brought into this State" in the 1st section of the Revised Statutes, meant only "introduced or brought" for the purpose of remaining here. So they did undoubtedly when the Revised Statutes were passed, for an express exception followed in the 6th section, giving that meaning to the 1st. And when the Legislature afterward repealed the 6th section, they entirely removed that meaning, leaving the 1st section, and intending to leave it, to mean what its own explicit, and unreserved and unqualified language imports.

Not thinking myself called upon to treat this case as a casuist or legislator, I have endeavored simply to discharge my duties as a judge in interpreting and applying the laws as I find them. Did not the law seem to me so clear, I might feel greater regret that I have been obliged to dispose so hastily of a case involving such important consequences.

My judgment is, that the eight colored persons mentioned in the writ, be discharged.

On the 9th day of November, 1852, the attorney for Lemmon sued out of the Supreme Court of the State of New York, a writ of certiorari to review the decision of Mr. Justice Paine. This decision was fruitful of newspaper discussion and was strongly criticised by the leading men and the press of the South.

Governor Cobb, of Georgia, in his annual Message, looked upon an adherence to the decision of Judge Paine as a just cause of war. He says:

If it be true that the citizens of the slaveholding States, who, by force of circumstances or for convenience, seek a passage through the territory of a non-slaveholding State with their slaves, are thereby deprived of their property in them, and the slaves *ipso facto* become emancipated, it is time that we know the law as it is. No court in America has ever announced this to be law. It would be exceedingly strange if it should be. By the comity of nations the personal status of every man is determined by the law of his domicile, or whether he be bond or free, capable or incapable there, he remains so everywhere a new domicile is acquired. This is but the courtesy of nation to nation founded not upon the statute, but is absolutely necessary for the peace and harmony of States and for the enforcement of private

justice. A denial of this comity is unheard of among civilized nations, and if deliberately and wantonly persisted in, would be just cause of war.

Governor Johnson, of Virginia, made it the subject of a special communication to the Legislature of that State, in which he says :

The decision of Judge Paine is in conflict with the opinions and decisions of other distinguished jurists, without, I believe, a single precedent to sustain it. In importance it is of the first magnitude, and in spirit it is without its parallel. If sustained, it will not only destroy that comity which should ever subsist between the several States composing this confederacy, but must seriously affect the value of slave property wherever found in the same. . . . I deem the subject of sufficient public importance to require and receive the attention of the government of this Commonwealth, and recommend that, for the present, provision shall be made by the General Assembly for the efficient prosecution of the appeal taken. . . . If the statute of New York has been rightfully expounded by the learned judge, and is not in conflict with the Constitution of the United States, it is proper that Virginia should know it. The same sovereign power by which New York enacts her laws and gives them force within her limits, pertains to Virginia within hers, and to them she will have to look for redress.

To this the General Assembly responded by the passage of a resolution directing the Attorney General of the State of Virginia to prosecute before the Supreme Court of New York, together with such other counsel as the executive might think proper to associate with him, the appeal taken from Judge Paine's decision.

In pursuance of a joint resolution of the Legislature of the State of New York, passed February 24, 1855, Gov. Clark appointed the Hon. E. D. Culver and Joseph Blunt, Esq., as counsel to be associated with the Hon. Ogden Hoffman, who was then the Attorney General—to defend the interests of the State of New York, involved in the case, on the appeal prosecuted by the State of Virginia.

Upon the death of Mr. Hoffman soon afterward, Wm. M. Evarts, Esq. was appointed to act as counsel in his place, by Gov. King.

The appeal taken, for the purpose of reviewing the decision of Mr. Justice Paine, came on to be heard before the Supreme Court of the State of New York, at a General Term held in the city of New York, in December 1857. The justices sitting, were William Mitchell, Presiding Justice, and James J. Roosevelt, Charles A. Peabody, Henry E. Davies, and Thomas W. Clerke.

The argument before the Supreme Court is fully reported in 26 Barbour 270 (N. Y. Supreme Court).

The Court affirmed the order of Mr. Justice Paine, Justice Roosevelt dissenting. The following opinion was delivered.

OPINION GIVEN IN THE SUPREME COURT—MITCHELL, P. J.

The act of the Legislature of this State passed in 1817 and reenacted in parts in 1830 (1 R. S. 656) declaring that "no person held as a slave shall be imported, introduced or brought into this State on any pretence whatsoever except in the cases herein specified and that every such person shall be free" applies to this case. The slaves in this case were brought from Virginia into this State and remained here some short time; and although they were only brought here with the view to carry them from this State to Texas, they were (after the exceptions in that act were repealed by a subsequent act) within the prohibitions of that act and are free if those acts be constitutional. The addition made to the act in the Revised Statutes of

1830 seems to have been intended to place this beyond doubt (see sect. 16, p. 559). It is "Every person born within this State, whether white or colored, is FREE (the capitals are so in the Statute), every person who shall hereafter be born within this State shall be *Free*, and every person brought into this State as a slave, except as authorized by this title, shall be FREE"—one of the exceptions mentioned in that title allows a person not an inhabitant of this State, travelling to or from or passing through this State, to bring his slave here and take him away again: provided that if the slave continued here more than nine months he should be free. Those exceptions are repealed by the act of 1841.

Comity does not require any State to extend any greater privileges to the citizens of another State than it grants to its own. As this State does not allow its own citizens to bring a slave here even *in transitu* and hold him as a slave for any portion of time, it cannot be expected to allow the citizens of another State to do so. Subdivision 1. of Section 2, of Article 4 of the Constitution of the United States, makes this measure of comity a right, but with the limitation above stated, it gives to the citizens of a sister State only the same privileges and immunities in our State which our laws give to our own citizens.—It declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States:"

Subdivision 3 of that section is confined to the case of a person held to service or labor escaping from one State into another: it does not extend to the case of a person voluntarily brought by his master into another State for any period of time: it cannot by any rule of construction be extended to such a case. It is "no person held to service or labor in one State under the laws thereof *escaping* into another shall, in consequence of any law or regulation therein, be discharged from such service or labor," etc.

The clause of the Constitution, giving to Congress power "to regulate commerce with foreign nations and among the several States and with the Indian tribes," confers no power on Congress to declare the *Status*, which any person shall sustain while in any State of the Union. This power belonged originally to each State by virtue of its sovereignty and independent character and has never been surrendered. It has not been conferred on Congress or forbidden to the States unless in some provisions in favor of personal rights: and is therefore retained by each State, and may be exercised as well in relation to persons *in transitu* as in relation to those remaining in the State.

The power to regulate commerce may be exercised over persons as passengers, only when on the ocean and until they come under State jurisdiction. It ceases when the voyage ends, and then the State laws control.

This power to regulate commerce, it has been expressly declared by the Supreme Court of the United States, did not prevent the State of Mississippi from prohibiting the importation of slaves into that State for the purpose of sale. The same court has held that goods when imported can (notwithstanding any State laws) be sold by the importer in the original packages. It follows that the powers to regulate commerce confers on the United States some check on the State legislation as to goods or merchandise after it is brought into the State, but none as to persons after they arrive within such State.

If this could be regarded in the case of the slaveholding States a police regulation, it may also be so regarded as to the free States, they consider (as the Legislature of this State for many years has shown) that the holding of slaves in this State, for any purpose is as injurious to our condition and to the public peace, as it is opposed to the sentiment of the people of this State.

The judgment or order below should be affirmed with costs.

From this decision, an appeal was taken to the Court of Appeals.

THE CASE IN THE COURT OF APPEALS.

THE case came on for argument in the Court of Appeals on the 24th day of January 1860, before the full bench, GEORGE F. COMSTOCK, Chief Judge; HENRY E. DAVIES, SAMUEL L. SELDEN, and HIRAM DENIO, Judges of the Court of Appeals, and THOMAS W. CLERKE, WILLIAM B. WRIGHT, WILLIAM J. BACON, and HENRY WELLES, Justices of the Supreme Court, then sitting in the Court of Appeals.

CHESTER A. ARTHUR appeared as attorney for the People, Respondents and WILLIAM M. EVARTS and JOSEPH BLUNT as counsel.

H. D. LAPAUGH appeared as attorney for the Appellant and CHARLES O'CONOR as counsel.

Mr. O'Conor for the Appellant, presented the following printed statement and points :

STATEMENT OF FACTS.

A writ of Habeas Corpus was allowed by the Hon. Elijah Paine, then a justice of the Superior Court of the city of New York, Nov. 6, 1852, to inquire touching the detention of eight colored persons, to wit: one man, two women and five children.

Jonathan Lemmon, the plaintiff, having been served with said Habeas Corpus, made a return thereto. The relator demurred to the return. The judge's final order was made upon the facts stated in the return.

The return stated that Juliet Lemmon, the plaintiff's wife, was and had been for several years, a citizen and resident of the State of Virginia; that the said eight persons were her slaves, inherited and owned by her, and held to labor by her as her slaves in that State, under and by virtue of the laws thereof; that intending to go with her said slaves from Virginia to the State of Texas as an ultimate destination, she necessarily took passage with her slaves on board a certain steamship called the City of Richmond at Norfolk in the State of Virginia bound for the State of Texas aforesaid; that by the laws of Texas, she, the said Juliet, was and would be entitled to the said slaves and to their service or labor in like manner as she was entitled to the same by the laws of Virginia; that she was compelled by necessity to touch or land at the harbor of New York without remaining or intending to remain longer than necessary; that she did not bring the said slaves into the State of New York to remain therein, in any manner or for any purpose whatever, except *in transitu* from the State of Virginia to the State of Texas as aforesaid through the port or harbor of New York on board of said steamship; that the said slaves so passing from Norfolk on board of said steamship, never touched, landed in, or came into the harbor of New

York, except for the mere purpose of such passage as aforesaid; and that the said Juliet Lemmon was so on her way, *in transitu*, as aforesaid, with the said eight slaves in her custody and possession, when, on the sixth day of November, 1852, the said writ of Habeas Corpus was served upon her.

And that the slaves were not restrained against their will. Judge Paine by his final order now under review dated Nov, 13, 1852, liberated the slaves from custody.

Pursuant to R. S. part 3, ch. 9, title 1, art. 2. §§ 69 and onward, Mr. Lemmon sued out of the Supreme Court, on Nov. 9, 1852, a writ of certiorari to review this decision. The judge certified the proceedings had before him to the Supreme Court, in December, 1852. Errors in law were duly assigned. The defendants joined in Error, and in December, 1857, the General Term sitting in the city and county of New York, affirmed the order, with costs.

Mr. Lemmon appealed to this Court.

MR. O'CONOR'S POINTS FOR THE APPELLANT.

FIRST POINT. Except so far as the State of New York could rightfully, and without transcending restraints imposed upon her sovereignty by the Constitution of the United States, forbid the *status* of slavery to exist within her borders in the person of an African negro, and except so far as she has, in fact, expressly or impliedly forbidden it by actual legislation, an African negro may be lawfully held in that condition in this State.

1. The ancient general or common law of this State authorized the holding of negroes as slaves therein. The judiciary never had any constitutional power to annul, repeal or set aside this law; and, consequently, it is only by force of some positive enactment of the legislative authority that one coming into our territory with slaves in his lawful possession could suffer any loss or diminution of his title to them as his property.

(1.) In every known judgment, argument or opinion of court, judge or counsel relating to the subject, it is admitted, in some form, that at an early period negro slavery existed under the municipal law in each one of the thirteen original States which formed this Republic by declaring its independence in 1776 and adopting its Constitution in 1789. By what means it had its first reception and establishment in any of them as an institution sanctioned by law, may not be historically traceable; but in most, if not in all of them, and certainly in New York, it was expressly recognized by statute prior to the time when the States themselves asserted their independence.

28 Oct. 1806. Van Schaick's laws, p. 69.

29 Oct. 1733. *Ib.* p. 157.

Colonial Slave Act of N. Y., March 8, 1773.

Jack *vs.* Martin, 12 Wend. 328.

Jackson *vs.* Bulloch, 12 Conn. R. 42, *Ib.* 61.

Cómith *vs.* Ayres, 18 Pick. 208-9.

Per Cur. Scott *vs.* Sandford, 19 How. 407-8.

Hargrave's Argt., Point 5th, 20 State Trials, page 60.

Per McLean J., 16 Peters 660; 15 *Ib.* p. 507.

(2.) Negro slavery never was a part of the municipal law of England, and consequently it was not imported thence by the first colonists. Nor did they adopt any system of villeinage or other permanent domestic slavery of any kind which had ever existed in England or been known to or regulated by the laws or usages of that kingdom. They were a homogeneous race of free white men; and in a society composed of such persons, the slavery

of its own members, endowed by nature with mental and physical equality, must ever be repugnant to an enlightened sense of justice. Of course, the colonists abhorred it, saw that it was not suited to their condition and left it behind them when they emigrated.

Doctor and Student Dialogue, 2 Ch. 18, 19.

Wheaton *vs.* Donaldson, 8 Peters, 659.

Van Ness *vs.* Pacard, 2 Peters, 444.

1 Kent's Com. 373.

Const. N. Y., Art 1, § 17.

Neal *vs.* Farmer, 9 Cobb's Geo. R. 562, 578.

(3.) As neither the political bondage nor the domestic slavery which the European by fraud and violence imposed upon his white brethren ever had a legal foothold in the territory now occupied by these States, the inflated speeches of French and British judges and orators touching the purity of the air and soil of their respective countries, whatever other purpose they may serve, are altogether irrelevant to the inquiry what was or is the law of any State in this Union on the subject of negro slavery.

See French Eloquence A. D. 1738, 20 State Trials, 11, note.

" English " " 1762, 2 Eden's R. 117 Lord Northington.

" " " " 1765, 1 Bl. Com. 127, 124.

" " " " 1771, 20 State Trials, 1 Lord Mansfield.

" Scotch " " 1778, Ib. p. 6, note.

" Irish " " 1793, Rowan's Trial, Curran.

" Judge McLean's criticism in Dred Scott, 19 How., 535.

" Lord Stowell's " 2 Hagg. Ad. R., 109.

(a.) The only argument against negro slavery found in the English cases at all suitable for a judicial forum, rests on the historical fact that it was *unknown* to the English law. Mr. Hargrave, in Somerset's case, showed that *White Englishmen* were alone subject to the municipal slave laws of that country at any time; that negro slavery was a new institution, which it required the legislative power to introduce.

20 State Trials, p. 55. Com. *vs.* Aves, 18 Pick., 214.

(b.) Lord Holt and Mr. Justice Powell were Mr. Hargrave's high authority for the proposition, that whilst the common law of England recognized white English slaves or villeins, and the right of property in them, yet it "took no notice of a negro." That a white man might "be a villein in England," but "that as soon as a negro comes into England he became free." It was only NEGRO liberty that the know-nothingism of English and French law established. English and French air had not its true enfranchising purity till drawn through the nostrils of a negro. White slaves had long respired it without their *status* being at all affected.

Smith *vs.* Brown, 2 Salk., 666.

20 State Trials, 55, note.

(c.) Lord Mansfield said in Somerset's case, "The state of slavery is of such a nature that it is incapable of being introduced on any reason, moral or political, but only by positive law," and negro-philism has been in raptures with him ever since. Nevertheless, it was a bald, inconsequential truism. It might be equally well said of any other *new* thing not recognized in any known existing law.

Per Ashhurst, J., 3 T. R. 63.

(4.) The judiciary never had power to annul, repeal, or set aside the slave law of this State, which we have shown existed with the sanction of the legislature prior to the Revolution.

(a.) Judicial tribunals in this country are a part of the government, but by the genius of our institutions, and the very words of our fundamental charters, they are restrained from any exercise of the law-making power. That governmental function is assigned to a separate department.

(b.) By this strict separation of governmental powers, we have given form and permanency to a maxim of politico-legal science always acknowledged

by the sages of the English law in theory, though often violated in practice.

(c.) For proofs of this acknowledgment we refer to the habitual definition of judicial power—*jus dare et non jus facere*. Again, the wise and learned Sir John Eardley Wilmot says, "Statute law and common law originally flowed from the same fountain—the legislature. Statute law is the will of the legislature; the common law is nothing else but statutes worn out by time; all our law begun by consent of the legislature; and whether it is now law by usage or by writing, it is the same thing." (*Collins vs. Blantern*, 2 Wils., 348; 1 Kent, 472.) This is sound doctrine; but it has often been departed from in practice.

(d.) In some instances the departure has been very striking. The legislative authority of Great Britain, in 1285, sought, by the celebrated statute *de donis*, to make entailed lands absolutely inalienable. As far as the plain and direct expression of its sovereign will by the supreme law-making power could have that effect, they were rendered inalienable. The judges, without a shadow of constitutional right, contrived the absurd and irrational fiction of a common recovery, and thereby virtually repealed the statute. (2 Bl. Com., 116—Per Mansfield; 1 Burr. R., 115—L. O. J. Willes R., 452.)

The English legislature was governed by what we, with our present lights, may deem a pernicious policy, tending to restrain commerce in land, to tie it up in few hands, and to draw into operation numerous social evils. The unfettering of estates by the English judges, through the devices to which they resorted, had its origin in a wise regard for the interests of the people; but *in them*, it was mere trick and rank usurpation. So said Lord Eldon from his place as President of the House of Lords, at a period when constitutional law was better understood in England. In pronouncing the judgment upon the case of the Queensberry leases (1 Bligh's P. Rep., 1st series, p. 435, A.D. 1819), he says, "The power of judges in this respect may be doubted. Upon that subject, as it applies to English law, I have formed an opinion that the judges of *this age*, in England, would not have been permitted to get rid of the statute of English entails, as judges of that age did soon after the passing of the statute *de donis*." (See 38 Eng. L. and Eq. 454.)

(e.) Those lawyers who have failed to perceive, as Lord Eldon did, the necessity of keeping separate the great departments of the government, whose professional pride was greater than their knowledge of constitutional jurisprudence, have frequently boasted of a tendency amongst the English jurisconsults and judges to defeat what to them seemed impolitic and unjust resolutions of the legislative department. They erred. Far better that supposed mischiefs should exist for a time by the ill-advised sanction of the legislature than that, by usurping powers not granted, the high-priest of justice should defile himself and the temple in which he officiates, by the sin of willfully violating the fundamental law. Error should not be combated by error, by crime, or by ingeniously conceived fraudulent devices and evasions, but by fair argument and open remonstrance addressed to those whom the Constitution has invested with the sole power of orderly and legitimate correction. An instance of this ill-considered self-gratulation may be found in the otherwise admirably written argument of Mr. Hargrave, as counsel for the negro Somerset, before Lord Mansfield. The last sentence of that argument, vaguely to be sure, and, perhaps, somewhat covertly, commends the astuteness of the English judges in circumventing the lord under the system of English villeinage, by which they gradually undermined that part of the ancient law of England. (20 Howell's State Trials, p. 67; *Ib.*, p. 27.) Negro slavery in the West Indies was sanctioned by numerous English statutes. This afforded an argument, certainly, of much force in favor of permitting an English subject, who lawfully held slaves in that part of the British dominions, temporarily to visit England with his bondman. The argument was opposed by this appeal to judicial pride; it was overruled by the dictum of a judge much more re-

nowned for his tendencies to usurp the power of making law than for any inclination to diminish prerogative or to defend the liberty of his white fellow-subjects. The pride of office, the pride of learning, and an ostentatious vanity, rather than any tenderness for the rights and enjoyments of the lowly, dictated the loose declamation by which he installed himself as the champion of negro emancipation.

II. The judicial department has no right to declare negro slavery to be contrary to the law of nature, or immoral, or unjust, or to take any measures or introduce any policy for its suppression founded on any such ideas. Courts are only authorized to administer the municipal law. Judges have no commission to promulgate or enforce their notions of general justice, natural right or morality, but only that which is *the known law of the land*.

1 Kent's Com. 448.

Doct. and Student Dial. 1 ch. 18, 19.

Per Maule, J. 13 Ad. & Ell. n. s. 387, note.

III. In the forensic sense of the word *law*, there is no such thing as a law of nature bearing upon the lawfulness of slavery, or indeed upon any other question in jurisprudence. The law of nature is in every juridical sense, a mere figure of speech. In a state of nature, if the existence of human beings in such a state may be supposed, there is no law. The prudential resolves of an individual for his own government, do not come under the denomination of *law*. Law, in the forensic sense, is wholly of social origin. It is a restraint imposed by society upon itself and its members.

Rutherford's Inst., B. 1, ch. 1, § 6, 7.

1 Bl. Com. 43—1 Kent, 2.

Wheaton's Elements of Int. Law, 2 to 19.

Cooper's Justinian. Notes, p. 405.

Bowyer on Public Law, 47 and onward.

(1.) If there was any such thing as a law of nature, in the forensic sense of the word *law*, it must be of absolute and paramount obligation in all climes, ages, courts and places. Inborn with the moral constitution of man, it must control him everywhere, and overrule as vicious, corrupt and void every opposing decree or resolution of courts or legislatures. And accordingly, Blackstone, repeating the idle speech of others upon the subject, tells us that the *law of nature* is binding all over the globe; and that no human laws are of any validity if contrary to it. (1 Wendell's Blackstone 40, 41, 42 and notes.) Yet, as the judiciary of England have at all times acknowledged negro slavery to be a valid basis of legal rights, it follows either that such slavery in the practical judgment of the common law, is not contrary to the law of nature, or if it be, that such law of nature is of *no force* in any English court.

Acc. Bouvier's Inst., § 9.

Acc. Brongham Ed. Rev., Apl. 1858, p. 235.

(2.) The common law judges of England, whilst they broke the fetters of any negro slave who came into that country, held themselves bound to enforce contracts for the purchase and sale of such slaves, and to give redress for damages done to the right of property in them. This involves the proposition that there was no paramount law of nature which courts could act upon prohibiting negro slavery.

Madraza *vs.* Willes, 3 B. & Ald., 353—18 Pick., 215.

Smith *vs.* Brown, Salk., 666.

Cases cited in note, 20 State Trials, 51.

The Slave Grace, 2 Hagg. Adm. R., 104.

(3.) The highest courts of England, and of this country, having jurisdiction over questions of public, or international law, have decided that holding negroes in bondage, as slaves, is not contrary to the law of nations.

The Antelope, 10 Wheaton, 66—18 Pick., 211.

The Slave Grace, 2 Hagg. Adm. R., 104, 122.

(4.) When Justinian says in his Institutes, Book 1. tit. 2, § 2, and elsewhere, that slavery is contrary to the law of nature, he means no more than that it does not exist by nature, but is introduced by human law, which is true of most if not *all* other rights and obligations. His definition of the law of nature, Book 1, title 2, "*de jure naturali*," proves this; his full sanctions of slavery in Book 1, tit. 3, § 2 and tit. 8, § 1, confirm it.

Cushing's Domat., § 97.

Bowyer on Public Law, p. 48.

1 Cobb's Law of Negro Slavery, § 5.

(5.) All perfect rights, cognizable or enforceable as such in judicial tribunals, exist only by virtue of the law of that state or country in which they are claimed or asserted. The whole idea of property arose from compact. It has no origin in any law of nature as supposed in the court below.

5 Sandf. 711, Rutherford's Inst., Book 1. ch. 3, §§ 6, 7.

(6.) The law of nature spoken of by law writers, if the phrase has any practical import, means that *morality* which its notions of policy leads each nation to recognize as of universal obligation, which it therefore observes itself, and, so far as it may, enforces upon others. It cannot be pretended that there ever was in England, or that there now is in any State of this Union, a law, by any name, thus outlawing negro slavery. The common law of all these countries has always regarded it as the basis of individual rights; and statute laws in all of them recognized and enforced it.

The Slave Grace, 2 Hagg. Adm., 104.

Per Shaw, Ch. J. 18 Pick., 215.

1 Kent, 2, 3; 3 Ib. 2; 2 Wood's Civil Law, 2.

(a.) No civilized State on earth can maintain this absolute outlawry of negro slavery; for in some of its forms slavery has existed in all ages; and no lawgiver of paramount authority has ever condemned it.

Cooper's Justinian; notes, p. 410; Inst. Book 1, tit. 3.

Per Bartley, C. J. 6 Ohio, N. S. 724.

Senator Benjamin, 1858.

(b.) It has never been determined by the judicial tribunals of any country, that any right, otherwise perfect, loses its claim to protection, by the mere fact of its being founded on the ownership of a negro slave.

(7.) The proposition that freedom is the general rule, and slavery the local exception, has no foundation in any just view of the law as a science. Equally groundless is the distinction taken by Judge Paine between slave property and other movables.

(a.) Property in movables does not exist by nature, neither is there any common law of nations touching its acquisition or transfer.

Bowyer on Universal Public Law, 50.

(b.) Every title to movables must have an origin in some law. That origin is always in and by the municipal law of the place where it is acquired; and such law never has *per se* any extra territorial operation.

(c.) When the movables, with or without the presence of their owner, come within any other country than that under whose laws the title to them was acquired, it depends on the will of such latter state how far it will take notice of and recognize, *quoad* such property and its owner, the foreign law.

Bk. of Augusta *vs.* Earle, 13 Peters, 589.

(d.) It has become a universal practice among civilized nations to recognize such foreign law except so far as it may be specially proscribed. This *usage* amounts to an agreement between the nations, and hence the idea of property by the so called law of nations.

(e.) Hence it will be seen that property in African negroes is not an exception to any general rule. Upon rational principles, it is no more local or peculiar than other property. And there is so much of universality about it that in no civilized state or country could it be absolutely denied all legal protection.

IV. In fact there is no violation of the principles of enlightened justice nor any departure from the dictates of pure benevolence in holding negroes in a state of slavery.

(1.) Men, whether black or white, cannot exist with ordinary comfort and in reasonable safety otherwise than in the social state.

(2.) Negroes, alone and unaided by the guardianship of another race, cannot sustain a civilized social state.

(a.) This proposition does not require for its support an assertion or denial of the unity of the human race, the application of Noah's malediction, (9 Geo. R. 582), or the possibility that time has changed and may again change the Ethiopian's physical and moral nature.

(b.) It is only necessary to view the negro as he is, and to credit the palpable and undeniable truth, that the latter phenomenon cannot happen within thousands of years. For all the ends of jurisprudence this is a perpetuity.

Facciolati's Latin Lexicon "Æthiops."

1 Cobb's "Historical Sketch of Slavery," 40, 41.

Notes to same, p., 44.

(c.) The negro never has sustained a civilized social organization, and that he never can is sufficiently manifest from history. It is proven by the rapid though gradual retrogression of Hayti toward the most profound depths of destitution, ignorance and barbarism.

McCulloch's Geog., Dict. Hayti, pp. 693, 4.

De Bow's Review, vol. 24, p. 203.

(d.) That, alone and unaided, he never can sustain a civilized social organization is proven to all reasonable minds, by the fact that one single member of his race has never attained proficiency in any art or science requiring the employment of high intellectual capacity. A mediocrity below the standard of qualification for the important duties of government, for guiding the affairs of society, or for progress in the abstract sciences, may be common in individuals of other races; but it is universal amongst negroes. Not one single negro has ever risen above it.

Malte Brun's Geo., book 59. p. 8.

Gregoire's "Literature of the Negroes."

"Biog. Univ. Supt." vol. 56, p. 83. Gregoire.

(e.) It follows that in order to obtain the measure of reasonable personal enjoyment and of usefulness to himself and others for which he is adapted by nature, the negro must remain in a state of pupillage under the government of some other race.

(f.) He is a child of the sun. In cold climates he perishes; in the territories adapted to his labors, and in which alone his race can be perpetuated, he will not toil save on compulsion, and the white man cannot; but each can perform his appointed task—the negro can labor, the white man can govern.

(3.) Morality or those dictates of enlightened reason, which have sometimes been called the law of nature, do not oblige any man to serve another without an equivalent reward for the service rendered.

(a.) The obligations of charity form no exception to this rule. Charity enjoins gratuitous service to those who are *unable* to repay; it is not due to sturdy indolence.

Doctor and Student, Dial. 1, ch. 6.

(b.) The universal voice of mankind concedes to the parent a right to the profit and pleasure which may be derived by him from the services of his minor child as a due return for guardianship and nurture.

(c.) Who shall deny the claim of the intellectual white race to its compensation for the mental toil of governing and guiding the negro laborer? The learned and skillful statesman, soldier, physician, preacher, or other expert in any great department of human exertion where mind holds dominion over matter, is clothed with power, and surrounded with mate-

rials for the enjoyment of mental and physical luxuries, in proportion to the measure of his capacity and attainments. And all this is at the cost of the mechanical and agricultural laborer, to whom such enjoyments are denied. If the social order, founded in the different natural capacities of individuals in the same family, which produces these inequalities, is not unjust, who can rightfully say of the like inequality in condition between races differing in capacity, that it is contrary to a law of nature, or that the governing race who conform to it are guilty of fraud and rapine, or that they commit a violence to right reason which is forbidden by morality?

(4.) "*Honeste vivere, alterum non ledere et suum cuique tribuere*" are all the precepts of the moral law. The honorable slaveholder keeps them as perfectly as any other member of human society.

Inst. Book 1, tit. 1, § 3.

1 Bl. Com. 40—9 Georgia R. 582.

(a.) The cruelties of vicious slaveowners and the horrors of the slave trade are topics quite irrelevant. It is universal experience that wealth and power afford *occasion* for the development of man's evil propensities; but as they are also the necessary *means* of his improvement, they cannot be called *evils* in their own nature.

(b.) The tone of mind, which, arrogating to itself superior purity of life and a higher moral tone than in the *then existing state of knowledge* could be supposed to have existed among the guests at the marriage in Cana of Galilee (John, ch. 2)—enjoins, as a duty, total abstinence from wine, is well kept up in the assumption of a political and moral excellence beyond the mental reach of our sires, and the consequent demand for an immediate abolition of negro slavery.

(c.) Certain assumptions of anti-slavery agitators have been too much indulged by the moderate, peaceful and conservative. Chief Justice Marshall let pass uncondemned their irrelevant triviality about the law of nature; (6 Peter's Cond. 36, 10 Wheaton, 114); and Chief Justice Taney concedes to them that the negro race, merely because denied political rights, is to be regarded as "unfortunate" (19 How. p. 407), and "unhappy," *ib.* 409. The fathers of the Republic, when forming a temporary league, in the face of the foe and on the eve of battle (7 Cushing, 295), declined to peril all by delay and discord upon a scruple about inserting in the compact an unnecessary word (19 How. 575); but when those to whom for peace sake "an inch" has been thus conceded, proceeding on the "take an ell" principle, demand, as a consequence of the precedent, the power to destroy, we must withdraw all such concessions and go back to principles.

SECOND POINT.—The unconstitutional and revolutionary anti-slavery resolutions of April, 1857, cannot retroact so as to affect this case.—(Vol. 2, p. 797—Westminster Review, Vol. 45, p. 76 to 98, article "manifest destiny.") Prior to that time, no legislative act of this State had ever declared that to breathe our air or touch our soil should work emancipation *ipso facto*; nor had any statute been enacted which, by its true interpretation, denied to our fellow-citizens of other States an uninterrupted *transitus* through our territory with their negro slaves.

I. The special injunctions and guaranties of the Federal Constitution secure to the citizens of the several States free intercourse with all parts of the Republic.

II. Even inter-state comity, in its simplest form, awards a free transit to members of a friendly State with their families and rights of property, without disturbance of their domestic relations.

Curtis Arg: 18 Pick. 195, and cases cited.

Paine J., 5. Sandford's R. 710.

McDougall Arg: 4 Scam. 467, 468.

III. Whatever others may do, no American judge can pronounce slave property an exception to this rule upon the general ground that slavery is immoral or unjust. Every American citizen is bound by the Constitution of the United States to regard it as being free from any moral taint which could affect its claims to legal recognition and protection, so long as any State in the Union shall uphold it.

(1.) The provisions of the Federal Constitution for its protection cannot otherwise be kept in candor and good faith.

(2.) In this spirit, faithful Christians and even honorable unbelievers, keep all lawful contracts.

(3.) Portia's mode of keeping promises (Merchant of Venice, act 4, scene 1) is allowable only in respect to pacts having the form of contracts, but which are of no binding force or obligation in law or morals.

(4.) The American citizen, who, applying Shakspeare's doctrine, carries in his bosom a chapel illuminated by the "higher law," and devoted to those infernal deities, Evasion and Circumvention, may be justified if the constitutional compact be void; but if it be valid, he violates honor and conscience. It may be, however, that his devices are too subtle and ingenious to be reached by ordinary legal sanctions.

See last sentence *In Re Kirk*, 1 Parker's Cr. Cases, 95.

Commonwealth *vs* Fitzgerald, 7 Law Rep. 379.

Sim's Case—7 Cushing, 298.

1 R. S. p. 657, §§ 1, 16.

THIRD POINT.—The act of March 31st, 1817, as revised in 1830, even with the modification of its effect, wrought by the repeal of its exceptions in 1841, rightly understood, does not deny such right of passage.

Laws of 1817, p. 138, §§ 9, 15, 16, 17.

I. R. S. 656, §§ 1 to 16.

Laws of 1841, p. 227, § 1.

I. The words "*imported, introduced, or brought into* this State" unless extended by construction far beyond their import, do not apply to the mere *transitus* of a slave, in custody of a citizen of a slave-holding State being his owner, when quietly passing through this State on lawful occasion and without unnecessary delay.

Laws of 1817, p. 136, § 9; Laws of 1841, p. 227.

See opinion in this case, 5 Sanford's R. 716.

(1.) The repeal by the act of 1841 of the special privileges given by §§ 3 to 7 inclusive of the act of 1817, in the view most adverse to the slave-owner, merely left the words "*imported, introduced or brought into*" to be applied according to their natural import without those sections. So construed, they would not extend to a mere carrying through the State. The word "*into*" differs, in meaning from the word "*within*" as used in the legislation of 1857, and marks the characteristic difference between it and that of 1817.

(2.) It is impossible to give to the legislation of 1817, the comprehensive effect which was designed by the treasonable resolution of 1857. All will admit that a fugitive from slavery in Virginia, found in Vermont, may be carried back through New York under an extradition certificate. This would seem to prove that *carrying through the State* was not, in the judgment of the legislature, a *bringing into the State* within the meaning of the act of 1817.

Curia by Story, J. 16 Peter's R. 624.

Curia by Shaw, J. 18 Pick. 224.

FOURTH POINT.—The State of New York cannot, without violating the constitution of the United States, restrain a citizen of a sister State from

peaceably passing through her territory with his slaves or other property on a lawful visit to a State where slavery is allowed by law.

I. Congress has power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." Const. U. S., Art. 1. § 8, subd. 3.

II. This power is absolutely exclusive in Congress, so that no State can constitutionally enact any regulation of commerce between the States, whether Congress has exercised the same power over the matter in question or left it free.

{ Passenger Cases, 7 How. U. S. R. 572.

{ Per McLean J. 7 How. p. 400.

{ " Wayne J. and the Court, 7 How. 410, 411.

{ " McKinley J. 7 How. 455.

{ " Story J., City of N. Y. *vs.* Miln. 11 Peters, 158, 159, 156.

{ " Shaw Ch. J. Sim's Case, 7 Cushing 299, 317.

(1.) At all events, the States have not reserved the right to *prohibit*, and thus *destroy* commerce, or any portion of it.

(2.) The judgment below, asserts that a citizen of Virginia, in possession of his slave-property, cannot pass through the navigable waters of a non-slave-holding State on board of a coasting steamer, enrolled and licensed under the laws of Congress, without risk of having his vessel arrested under State law, and his property torn from him by force of Lord Mansfield's *obiter dictum* in Somerset's case. 2 Hagg. 107.

Gibbons v. Ogden, 9 Wheaton, 1.

{ Com. v. Fitzgerald, 7 Law Rep. 381.

{ In re. Kirk. 1 Parker, Cr. Cas. 69, cannot be sustained.

(3.) That proposition cannot be maintained. Each State is required to give full faith and credit to the public acts of every other (art. 4, § 1); to surrender to every other, fugitives from its justice, or from any personal duty (art. 4, § 2, sub. 2, 3). No citizen can be deprived of his privileges and immunities, by the action of a State other than his own. (Ib. § 1.) Commerce between the States is placed under the exclusive control of Congress. Art. 1, § 8, subd. 3. And Congress itself is forbidden to impose any burden on the external trade of a particular State, or to burden or prefer it in any way. (Const. art. 1, § 8, subd. 2—§ 9, subd. 5.)

(4.) Until the present case, it seems to have been universally conceded, and, at all events, it is clear in law, that a citizen of any State in the Union may freely pass through an intermediate State to the territory of a third without sacrificing any of his rights.

Per Shaw, Ch. J. 18 Pick. 224, 5.

Per Cur. Willard *vs.* People, 4 Scam. 468.

Sewell's Slaves, 3 Am. Juris. 406, 7.

7 Howard's U. S. R. 461.

See California case.

III. The word "commerce" as it is used in this constitutional grant of exclusive power to Congress, includes the transportation of persons and the whole subject of *intercourse* between our citizens of different States, as well as between them and foreigners. Consequently, no State can impose duties, imposts or burdens of any kind, much less penal forfeitures upon the citizens of other States for passing through her territories with their property, nor can any State interrupt or disturb them in such passage.

{ Passenger cases, 7 How. U. S. R. 572.

{ Per McLean J. 7 How. p. 401, 405, 407.

{ " Wayne J. and the Court, 7 How. 412, 413, 430, 352.

{ " " " 7 How. p. 434, 435.

{ " Catron J. 7 How. 450, 451.

{ " McKinley J. 7 How. 453.

{ " Grier J. 7 How. 461 to 463, Fourth Point, p. 464.

- { Per Baldwin J. *Groves v. Slaughter*, 15 Peters, 510, 511, 513, 515, 516, in point as to slaves.
 { See Arg't. of Mr. Clay, 15 Peters, 489, Mr. Webster, p. 495.
 { B. J. Walker contra, appendix, p. 48 and onward.
 { Curia per Marshall J. *Gibbons v. Ogden*, 5 Peters Cond. 567.

IV. This doctrine does not preclude a State from exercising absolute control over all *trading* of any kind *within* her borders; nor from any precautionary regulations for the preservation of her citizens or their property from contact with any person or thing which might be dangerous or injurious to their health, morals or safety.

- { Per McLean J. 7 How. 402, 403, 406, 408.
 { " Wayne J. 7 How. 417, 424, 426 to 428.
 { " Grier J. 7 How. 457.
 { " Baldwin J. 14 Peters, 615.
 { " Story J. 16 Peters, 625.
 { 5 How. 569, 570, 571.
 { *Gibbons v. Ogden*, 9 Wheat. 1; 5 Peters Cond. 578.

FIFTH POINT.—The constitutional guaranty to "the citizens of each State" that they "shall be entitled to all privileges and immunities of citizens *in* the several States" (art. 4, § 2, subd. 1), affords the citizen of any State, peacefully passing through another, a right to immunity from such disturbance as the plaintiff suffered from the order now under review.

I. This section would lose much of its force and beneficial effect if it were construed to secure to the non-resident citizen in travelling through a State only such "rights" as such State may allow to its own citizens. Its object was to *exempt* him from State power, not to *subject* him to it.

(1.) Class legislation is deemed perfectly legitimate. A State may impose grievous burdens on its own citizens of particular classes, say those of foreign birth, of German origin, over or under a particular age, *owning slaves anywhere*, or pursuing a particular occupation, etc. It may establish an agrarian law. Perhaps Utah might visit heavy penalties upon any of its male citizens for breathing its pure air or touching its pure soil without having at least six wives; an Amazonia may arise among our new States, and exhibit such a rule in the feminine gender.

Frost v. Brisbin, 19 Wend. 15.

Brown v. Maryland, 6 Peters Cond. R. 562.

(2.) Under a construction and policy of this kind, the non-slaveholding States could pen up all slaveholders within their own States as effectually as the slave is himself confined by the rule applied in this case. This power cannot be conceded.

Per Grier J. 7 Howard, 461 to 464.

II. This section is not to be thus narrowed. The Constitution recognizes the legal character "citizen of the United States" as well as citizen of a particular State. Art. 1, § 3, subd. 3, art. 2, § 1, subd. 5. The latter term refers only to *domicil*; for every citizen of a particular State is a citizen of the United States. And the object of this section is to secure to the citizen, when within a State in which he is not domiciled, the general privileges and immunities which, in the very nature of citizenship, as recognized and established by the Federal Constitution, belonged to that *status*; so that by no partial and adverse legislation of a State into which he may go as a stranger or a sojourner can he be deprived of them. It is a curb set upon state legislation harmonizing with the provision which extends the ægis of the federal judiciary to the non-resident citizen in all controversies between him and the citizens of the State in which he may be temporarily sojourning. Art. 3, § 2.

Per Curtis J. 19 Howard's R. 580.

III. This section, like its brother in the judicial article, applies only to the stranger. The moment a citizen of Virginia, ceasing from his journey, sits down in the State of New York without the intent of leaving, or makes, in fact, any stay beyond the reasonable halt of a wayfarer, he becomes a citizen of New York, and relinquishes all benefit from these important guaranties of the Federal Constitution.

IV. By the comity of civilized nations, the stranger is allowed to pass through a friendly territory without molestation. Even belligerents are allowed to pass their armies over a friendly neutral territory. (Vattel, Book 3, ch. 7, §§ 119 to 127. See Vattel, Book 2, ch. 8, §§ 108, 109, 110, chap. 10, §§ 132, 133, 134.) This comity, before existing between the States, was converted by the Constitution into an absolute right of the citizen. By the section quoted the citizen of each State is secured in all the general privileges and immunities of a citizen of the United States whilst temporarily and necessarily within a State other than that of his domicile. One of these is to be free from all burdens and taxation whatever; for, upon general principles, taxation is only imposed on residents or on dealings; another is to be free from local class legislation, for as a wayfarer he cannot be a member of any body of persons organized, governed or defined as a class under the state law. The words "privileges and immunities" are here used essentially, though perhaps not exclusively, in a passive sense. The object is not to compel States to give strangers the same "rights" which they award to their own citizens; but to exempt the stranger from burdens, or obstructions of any kind. To stop his vessel or his carriage *in transitu* and carry off his negro-servant recognized as his property by the laws of his own State and the Federal Constitution—is a manifest invasion of his just "privileges and immunities."

V. *Comity*, as understood in speaking of the *practice* of friendly nations toward each other, which has been denominated international law, has no place in the relation between the States of this Union, except occasionally, in particular cases, to illustrate, by a somewhat remote analogy, the duty of a State toward the citizens of another State, or in giving *due effect* to rights arising under *its* laws. That duty is imposed, not by *comity*, as a rule of action, but by the Federal Constitution.

Bowyer's Public Law, 161, 162.

(1.) Comity, like municipal law, has its foundation in compact, express or implied. The social or international compact *between the States*, as such, was *fixed* by the Federal Constitution.

Const. U. S., Art. I., § 10.

(2.) A State might enact that all obligations arising from the relation of parent and child during the minority of the latter are abolished within this State, and any child hereafter "imported, introduced, or brought into this State," shall thenceforth from all such obligations be *free*."

A State might enact that the relation of husband and wife was fraught with mischievous consequences, and in fact a cover for gross tyranny and oppression; "that the said relation shall no longer exist within this State; and that any wife hereafter *imported, introduced or brought into this State* shall, thenceforth, from all obligations of that condition, be *free*."

Young America might hurrah for the first law, and the class known as "strong minded women" might applaud the enactment of the latter.

On that occasion, one of the latter class upon a rostrum proclaiming "liberty to all women" might well adopt the anti-slavery speech of Judge Swan in 6 Ohio 671, giving it a new application.

"The positive prohibition becomes an active, operating, ruling principle, and not a parenthesis. It *strikes down and destroys!*"

What is there to protect this Union from the ruin and desolation of such laws except the guaranties of the Federal Constitution now relied upon? Unless they are enforced, in the form and to the extent which we demand, the unbridled sovereignty of our smallest State, so long as our present Union

lasts, will hold in its hand the power of dissolving our whole social system. Evil passions or some new fanaticism might at any moment set that power in motion.

SIXTH POINT.—The general doctrines of the court in *Dred Scott's* case must be maintained, their alleged novelty notwithstanding.

I. That admiralty jurisdiction could exist without either *tides* or *salt* was an idea too novel even for the great mind of Chief Justice Marshall; but, at last, judicial wisdom, sharpened and impelled by strong necessity cast aside these immaterial incidents and, looking to the substance of the thing, found in the constitution a government for our great rivers and inland seas.

Genessee Chief vs. Fitzhugh, 12 Howard's U. S. R. 443.

See Judge Daniel's Dissent, p. 464.

II. Whilst, in actual administration, some words used in our great political charters must thus be taken to comprehend more than was in the contemplation or intent of their framers, others, if we would preserve the Republic, must be carefully limited to the sphere covered by their mental vision at the time.

(1.) If Utah should make its peculiar institution a *religious duty*, as Thugs regard murder, and should conduct its rites with all the decency and external purity of patriarchal times, Congress, within its sphere, and the several States, within theirs, might still legislate against it to any extent without violating constitutional restraints. Our Republic was founded by a civilization, with the existence of which this practice is incompatible. Self preservation, if not a *law* of nature, is an invariable practice among men. If a State should fall into Thugism, and respect the assassination of travellers as a religious ceremony, could not Congress and the federal judiciary, or the national executive by its military force, repress the practice?

Edinb. Rev. for July 1858, p. 120.

(2.) The "men" who made the Declaration of Independence in 1776; the "free inhabitants" spoken of in the articles of confederation (Art. 4) in Nov. 1777, and the "inhabitants" and "male inhabitants" mentioned in the State Constitutions of that day (19 How. 574), did not include all to whom these terms were lexicographically applicable. Indians living in their tribes were not included (20 John's 710, 734. 19 How. 404.) The negroes were not included (19 How. 407. See *Curtis J. Contra* 19 How. 582.) When at the close of our revolutionary struggle the same great family of States sat down to frame the laws for a more perfect and a perpetual union, the "citizens" whom they recognized as the supreme original source of all political power were the same class who acted together at the outset. If, in such rare instances, and to such limited extent as to escape notice (18 Pick. 209) negroes had been permitted in particular places, by an overstrained liberality in the interpretation of laws, or by ignorance of them, to glide noiselessly into a partial exercise of political power, an inference fatal to the Republic should not thence be drawn. *De minimis non curat lex*.

(3.) The negro was forever excluded from social union by an indubitable law of nature; what folly it would have been to endow him with political equality. Indeed, it was impossible. It never has been done: it cannot be done.

(4.) Whenever the judiciary of the Union shall declare in respect to the emancipated negroes of the North that they are "citizens" of the State in which they dwell, and therefore under the Constitution (Art. 4, § 2, subd.

1) "entitled in the several (other) States to all privileges and immunities of citizens," the law of nature, to which negro-philism so frequently appeals, will irresistibly demand the dissolution of our Union. We maintain that the negro was not permitted during the storm of battle to steal into a place

in the fundamental institutions of our country, where, with full power to accomplish the fell purpose, he may lurk until the hour when it shall be his pleasure to apply the torch and explode our Republic forever.

SEVENTH POINT.—“It is highly fit that the court below should be corrected in the view which it has taken of this matter, since the doctrine laid down by it in this sentence is inconsistent with the peace of this country and the rights of other States.”

Per Lord Stowell, 1 Dodson, 99.

MR. O'CONOR'S OPENING ARGUMENT.

MAY IT PLEASE THE COURT:—The general question in which this merely private controversy took its rise, and now finds its whole aliment, has attracted attention throughout the length and breadth of these States, and indeed in every portion of the civilized world. Whatever may be thought of the interest which had attached to that question prior to the year 1852, when this suit had its inception, events have since occurred which impart to it at this day a degree of interest and importance that cannot be over estimated. Indeed, though merely presenting itself as a private suit, this controversy is of as high interest as any that has ever been discussed before any tribunal, legislative or judicial in our country, perhaps in the world. In moral and official dignity this tribunal is well chosen for its reception and adjudication. We are before the Supreme Judicial Court of that State which in point of material prosperity, is the foremost member of this Union; which in point of intelligence, may rank equal with any; and which in point of patriotism stands behind none. I speak of the State, in her simple majesty, as a moral being, and in reference to the true sentiment of her citizens. If without obstruction from the devices of politicians, we could look directly into the hearts of our people and see their true motives of action, I firmly believe that our State would stand equal with any other in honorable regard for her obligations to her sister States, and in honest devotion to the well-being of the whole republic.

It may be, however, that either through inattention, want of due reflection or the excitements of party strife, this subject has not yet attained that measure of importance in the judgment of our people, which it must attain before it can be properly investigated and thoroughly understood. If the general mind of New York, as represented in this her highest tribunal, is not yet awake, error may intervene even here. But whenever the importance of this great question shall have become sufficiently appreciated to secure a full attention to the principles which should govern inquiry, and to the consequences which are involved, it will be justly and wisely determined. If our republic is to endure, that time cannot be far distant. Nothing but this question has ever seriously menaced its existence, or threatened to defeat that which the enemies of mankind call an experiment; but which the virtuous and the hopeful, until absolutely vanquished, will ever regard as a triumphant success.

I am quite conscious, may it please your Honors, that I am addressing a judicial tribunal, and that very many things might be properly said in relation to this great subject in other places, which may seem not to have a place, and scarcely to be professionally proper or admissible here. Anxious at all times to obey the laws of my country, from the Constitution of the United States, which is our supreme law, down to the least important rule of the Court, not only in matter but in manner, I will, as far as practicable, forbear from urging any consideration, or presenting any argument that might fit another place, and be thought unbecoming here.

I shall endeavor to abstain from any remark which might be thought to

deviate from the cool, calm, deliberate method which the practice requires to be observed both by counsel and by the bench, in the prosecution of judicial inquiries. I say this much, to the end that what shall appear tame in my course of argument, may not be thought to indicate, on my own part, or on the part of those whom I represent, a want of proper feeling in respect to this great question, and in respect to the mighty interests involved.

The immediate circumstances which gave rise to this case are few and simple. They can be narrated in a moment.

In the year 1852, a fellow-citizen of ours, a lady residing in Virginia, had occasion to emigrate with her family to the new State of Texas, then but recently added to our Union. In the State of Virginia and in the State of Texas, many citizens living in comparative wealth, possess little property except what consists in their right to the service of their negro slaves. The lady in question, Mrs. Juliet Lemmon, the plaintiff in this cause, was a person thus situated. She had in her possession, constituting a material portion of the property which was necessary to her support, and being at the same time subordinate members of her household—eight negro slaves. It became her interest and that of her family to emigrate to Texas. The institution of negro slavery, be it remembered, then existed, and still exists precisely in the same degree in Texas as in Virginia; in both States it was and is recognized and protected by law. Mrs. Lemmon, with her family, including these eight slaves or servants, departed on board an American vessel, on her journey from Norfolk, in Virginia, to the State of Texas—sailing under the protection of the American navigation laws and the American flag. The nature of her journey created a necessity of touching at what was supposed to be the hospitable harbor of New York; and there, while temporarily staying for transshipment, or for some purpose not precisely explained in this record, but immediately connected with her transit from Virginia to Texas, her domestic peace suffered the invasion of which she complains. Some person, whether moved by benevolence or the love of distinction, I know not—a person wearing the proud name of Louis Napoleon—procured a writ of *habeas corpus* to be issued by the late Mr. Justice Paine, of the New York Superior Court, and brought these eight negroes before that judge, alleging that they were restrained of their liberty, contrary to the laws of this State. On the return of the writ, the facts which I have stated being shown, the judge decided that thus holding these negroes, was repugnant to the policy and to the laws of New York; even though it was merely for the purpose of transit from one slaveholding State to another. And it was asserted in his Honor's opinion, that so holding those negroes was repugnant to some law which our courts are bound to administer, and which is known to jurists as the law of nature. He therefore set them free; that is to say, he forbade this lady to carry her slaves out of the State. They were delivered from the condition of subjection in which they had been held; and this Virginia lady, by her fellow-citizens of the State of New York, through the action of their judicial tribunals, was deprived of her right to the services of her negro slaves. She at once denied the validity of that judgment. She has maintained that denial through the several stages of judicial appeal until this day, and it now comes up before your Honors for an adjudication which will be final, so far at least as this State may have power over it.

Your Honors will perceive that the original contestants in this case were, on the one part this Virginia lady, travelling through our State, compelled by necessity to intrust her person and her personal rights to our hospitality, and, on the other, these eight negroes or their assumed friend Louis Napoleon. He, I presume, is another negro, not rendering service to any one, but going about as a voluntary instigator of litigation in our metropolitan city. What may be thought of him is now of little moment. What of right or by courtesy was or is due to the lady whose domestic relations he disturbed is now of comparatively slight importance. These parties are essentially withdrawn from our view by the intervention of others.

Through appropriate legislative and executive action, two sovereign States have placed themselves before the Courts and the public, as the contestants. On the one side stands the State of New York, represented by my honorable friends—the foremost State, if not of the Union, at least of all the North; and upon the other, appears the State of Virginia (of which I am the humble representative), the foremost State of all the South—the “mother of states,” as she has been justly called—the parent of our independence and of our Union, as she might properly be called; for she gave birth to Jefferson, whose pen declared our independence, and to Washington, whose prowess achieved and established it. However humble may be the advocate on one side, and however feeble may be the argument that he shall present, still, looking to the real contestants before you, it must be admitted that the conflict has attained a dignity that may justly command the respect of all.

The lady whose domestic peace was thus invaded has invoked the protection of her native State; that State has responded to the call, and stands here this day her champion. New York has assumed the high office of vindicating the domiciliary visit of her intrusive black Napoleon.

Having thus presented the matters of fact and the question of law; having thus introduced to your Honor's attention the parties, and spoken of their claims to consideration, I now proceed to the argument.

It is familiar to us all, that at the foundation of our Republic the institution of negro slavery was not, by the several States of this Union, or indeed by any of them, regarded with the measure of abhorrence that legislators have subsequently seen fit to express. Until a period not very remote, there was not in this great State of New York, to whose laws alone I shall mainly refer in this connection, any such absolute intolerance of that institution as has grown up within the last few years. It is true that, impelled no doubt by sentiments of benevolence, and by motives praiseworthy in themselves, however short-sighted, many of our citizens, at an early period, opposed negro slavery as a pernicious thing. First, it was, so to say, mitigated, and thereafter, with moderate pace, it was, from time to time, diminished in its extent, until at length, as a portion of our domestic or local institutions, it was wholly abolished. But while an opinion adverse to its existence here was in this way exhibited by the citizens of New York, still no absolute intolerance of the opinions or the practice of our fellow-citizens in other States was manifested by our legislature or our courts. Until a period so late as the year 1841, say only about ten years anterior to the commencement of this suit, the obligations of friendship and of hospitality, and the duty of mutual toleration, were felt between ourselves and our brethren in the Southern States. Until that year it was not dangerous for a Virginia mother, whose babe was nursed by a fond and affectionate negro woman—born in the family, bred up under its protection, cherished and cared for by all its members with kindness and affection—to come into our State and visit her kindred residing therein. Until that year, a Virginia mother thus circumstanced might, in the summer season, withdraw from the ardent sun of her native clime, and visit in safety the cool retreats with which this great State is so highly blessed. She could enjoy our hospitality, cultivate kind relations with our people, retain the service of her attached and faithful servants, and at the season's close she could return with her babe still in the same arms and protected by the same fond care which had been usually enjoyed.

All this was positively and absolutely allowed and expressly secured by the very language of statutes enacted by our legislature. Thus the wise and beneficent policy of former times held out the olive branch of friendship to our brethren of the Southern States, and tendered to their acceptance the rites of hospitality. We invited them to come within our borders—to come with their whole households—to bring with them every member of their families, down to the humblest, and guarantied to them the preservation

of all their rights, their associations and domestic relations unimpaired and unaffected, during the period of their sojourn with us. We engaged that they might leave our territory with unimpaired rights and undisturbed relations.

But we have grown wiser or more foolish. We have found out at last what, in the halcyon days of our republic, the wisest and purest failed to see; we have found out that to tolerate the subjection of one human being to another, even for an hour, is such a monstrous outrage against some principle of natural justice, and is such a direct violation of *His Will*, whose Will must prevail, that we sin deeply and inexcusably, if we impose such subjection ourselves, or if we tolerate in any other its exaction even for an instant. Our modern revelation makes it deadly sin if we tolerate it, or if we fail to persecute it—I will not say with fire and sword—but if we fail to persecute it with every instrumentality in our power which has the form of law. And under the high enlightenment of this new revelation, the legislature of the great State of New York, in the year 1841, enacted the statute which is now arraigned before this tribunal as a void thing, if it has the meaning and intent claimed for it in the judgment now under review. By this statute, passed in 1841, only nineteen years ago, it was enacted, and is the law of this State—so far as an act of the legislature can make law—that no person “imported, introduced, or brought into this State,” shall be held in slavery. And thus the inflated language of orators, speaking at other times, in other places, and in actual practical reference to other things, than our negro slavery, and speaking most falsely, indeed, even as it respects the very things to which they did refer, has become realized within this State, so far as an act of our legislature can effect it.

What is the operation claimed for this statute? The moment an African-negro comes within the State of New York, he is elevated to the rank of a freeman; almost elevated to political equality—entirely so, indeed, if he have but a little speck of real property. He is elevated to political equality with the most favored of the Anglo-Saxon race; and but for a vulgar, but inveterate prejudice, he would also be elevated to social equality. That, however, is a thing not within the power of legislative enactment. The decision of that question must be sought, not in an appeal to this Court, but in an appeal to the taste of those who so loudly advocate the black man's political equality; and, it is quite clear, that by them such social equality would not only be pronounced unconstitutional, but would be negatived instantly and without form or trial, and justly so, for it is contrary to an invincible law of our nature.

Under the statute to which I have referred, it was decided in this case, that the owner (I must use the common phrase, though perhaps it is wholly inapplicable: it is convenient, is not liable to be misunderstood and avoids circumlocution), it was decided that the owner of a Virginia slave has not the right of passage through our territory accompanied by his servant, or carrying with him that portion of his property, even when the direst necessity forces him within our limits, and his intention is to quit them as soon as the pressure of that necessity shall have ceased. In a word, all the obligations of hospitality are by its terms, broken down, and the Virginia owner, in respect to his servant, is denounced as a sort of outlaw from the rites of hospitality as it respects his interest in the services of his slave. Whether he comes in his ship, or comes in his carriage—if he bring with him his servant, and can be brought within the reach of our officers—his servant will be torn from him, and he will be sent forth stripped of his property.

That is the statute the validity of which is intended to be drawn in question by the appeal now before this court; unless indeed, this learned court should hold that the statute does not admit of such a construction, that it does not apply to a person *in transitu* and only applies to those per-

sons who may bring their slaves into the State, with the intention of remaining. Such an interpretation would compel a reversal of the judgment below and a restoration of these slaves to Mrs. Lemmon. It may, however, be hardly a fit thing for this court, at this time, to consider whether or not the act admits of that limitation, because, as the main question was passed upon in the court below, and is now here, the main question might as well be met. This is very apparent. By a certain resolution of the legislature of this State, adopted in the year 1857, to which we have referred upon the points, there can be no doubt that at this moment, taking the statute-law of this State according to its letter and plain, manifest, unmistakable intent, it is *now* the law of this State that the right of mere passage through the State, with slave-property, is wholly abolished. And that it can only be maintained by a decision on the part of our judiciary or of some other having paramount authority, that all acts of the legislature, aiming to establish such a law, are repugnant to a higher law—the Constitution of the United States—and consequently void.

Nevertheless, this Court may conceive itself bound to confine its judgment within the narrowest limits of judicial duty, and simply to construe the single statute under which this case arose, and to apply that statute to the case, leaving the principal question to be determined at some future time. And, consequently, I will address myself to this question in its most restricted form as it arises under the act of 1841. In the first place, then, I maintain that that statute does not apply to the case of a southern owner, *in transitu*, or temporarily sojourning here, but only to the inhabitants of our State or persons dwelling within it.

But I shall also insist that if, in its proper construction, the act does apply to the stranger within our gates, it is repugnant to the Constitution of the United States, and void.

The words of the statute are, that no person "imported, introduced or brought into this State" shall be held in slavery. The first question here is—what mean these words, "imported, introduced, or brought into this State?" I maintain that they mean, and must be construed to import a bringing within the State, in the ordinary, natural simple sense of these words. They mean a bringing within the State, to be a part of our population, or of our property: the words do not apply to the mere act of crossing our boundary-line.

The limited construction which I thus claim for these words in this act, is objected to on certain grounds, which, in view of undisputed rules and principles for the construction of statutes, open the whole question, if not in its most enlarged sense, certainly in the most enlarged sense in which any question can well be discussed or considered in a court of justice, for we know that the functions of the judiciary are in certain respects much narrower than those of the other departments of the government, although in other respects, they are far more elevated and extensive.

The principles of construction which are invoked for the purpose of giving an enlarged, and, as it will be called, a liberal effect to these words—making them operate as a positive inhibition against carrying any slave inside of our boundary line, without thereby working his complete emancipation—are substantially these: It is asserted that the judicial construction of a statute must always be that which conforms to an enlightened sense of justice—which conforms to public policy; and that in proportion to the magnitude of the question in reference to which the act is passed and the meritorious character of the policy it is designed to advance, the act is to be liberally largely and beneficially expounded, for the attainment of the end in view.

I will not impugn these principles of construction. This mode of treating statutes, is certainly right and proper. But in the next step of their argument I must take issue with the learned gentlemen. Having laid down the principles of construction just stated and which, as before said, I do not dispute, they will call your attention to the *status*, or condition of

negro-slavery; and they will tell you that it is a monstrous outrage against natural justice; that all good and honest men are bound by the obligations of conscience to employ every means allowed by law for effecting its early extinction. They will assert that this being plain, manifest, undeniable, you are called upon to read and expound this statute in the light of a profound aversion to negro-slavery—in the light of a profound reverence for that principle of natural justice, and for that injunction of the divine law which, as they say, unite to condemn the institution. As a consequence, it will be claimed that you are not to limit in any way the words employed in this act but to extend them to every case that comes within any possible interpretation of them, or that comes within the reach of your judicial power. And upon this last proposition it is that my clients take issue, and I take issue with my learned friends and with their client, powerful as that client is.

Our first proposition is as stated in our First point: Except so far as the legislature may constitutionally prohibit negro-slavery within the borders of this State, and has in fact, in distinct words, restricted and forbidden it, there is nothing in the fundamental principles of our local or State law forbidding the slavery of African negroes, by force of which any Court can pronounce it to be immoral, or unjust, or contrary to any known law.

This is a great subject. This, in the present condition of affairs, is a mighty question. If we must discuss it upon authority, upon the writings and sayings of men by a recapitulation of eminent witnesses who have borne their testimony on either side of this great question—a mere catalogue of them would occupy more time than is allotted to any argument in this court. Therefore, in as great a degree as may be practicable, I shall confine myself to the general argument, without calling attention to the mighty weight of opinion that may be found on our side of this question; and so far as I shall speak of individuals whose voices have been heard or whose opinions have been written upon this subject, and who might be invoked as authorities, I shall confine myself mainly to the witnesses upon the other side. My object will be to show, that whatever merely written testimony of human opinion there may be upon that side, it weighs extremely little, even if there were nothing of the same kind on record militating against it. There will not be found upon my learned friends' side of this question many witnesses whom even they will venture to vouch upon this occasion as entitled to absolute reverence, whose actions through life did not contradict their words, if indeed they ever intended to maintain or ever understandingly advanced the proposition that negro-slavery is a sin in the sight of God, or an act of injustice in the eyes of rational men. I suppose that that proposition was never *understandingly* advanced by any man who entertained in his heart the sentiment of fidelity to this Union or to the Constitution of these United States. I think it never was so advanced by such a person. Of course, in uttering this sentence I have deliberately weighed my words, and I must admit that I attach, and from necessity, great importance, to the word "*understandingly*." Without that word I might hesitate to utter the sentence. The best and the wisest men have expressed opinions, and that too, after much deliberation, which were not understandingly entertained in the precise sense which their words left upon the records seem to bear. Sometimes the words employed fail to express accurately to our perception, the intent of the writer; and sometimes where no mistake of this kind can be asserted, further time for reflection, and further experience would have led the speaker or writer to qualify, and perhaps wholly to withdraw the opinion expressed. There is there in our judicial history—what is there in our common law, as called, or in the sources of our law, to entitle a court of justice at this time, of its own authority, and irrespective of obedience to the mandates of positive legislation, to pronounce negro-slavery unjust, or contrary to the fundamental principles of our institutions? What is there to war-

rant any court of justice in this State, or in any State of the Union, at this day, to pronounce such a sentence as that, preliminarily to an inquiry into the import of the few, simple words of plain English contained in this statute? I maintain that there is nothing to warrant it.

To prove this assertion I would inquire what are the bases of our law? Some persons maintain that the Holy Scriptures—the recorded legislation of Hebrew theocracy, together with the New Testament—enter into our law, or at least are bases or sources of it. An authority about the most eminent that can be cited on any proposition asserts the contrary. I have no doubt but my learned friends will invoke as a witness in their behalf the illustrious name of Jefferson. With that question I do not propose to deal. There is altogether too much variety of opinion upon such topics to make it at all expedient or desirable to touch them in this connection. I will assume that the Scriptures are a source of our law, if my learned friends please, or, at their option, they may assume the opposite. I will not, for any purpose of this case, deny either position. If the Holy Scriptures are among the bases of our law, my learned friends may prove, if they can—and without an observation on my part I shall leave your Honors to judge of their evidence—that in, what is called with reverence and propriety, the Word of God, there is to be found one single sentence by force of which we would be obliged to admit that our brethren and fellow-citizens, the slaveholders of the South, live all their days in positive violation of God's law. They may prove by Holy Writ, if they can, that, to the end of his long and glorious life, the founder of our Republic, the hero whom we all honor, lived in the same violation.

I pass from that topic. Either position may be assumed, as my friends think fit. My argument will remain unaffected whether they introduce the Scriptures as authority on this question or leave them out. Probably the latter would be the wiser course for them. If you turn away from the Holy Scriptures and take for your guides the lawless advocates of unlimited license and unregulated liberty who converted revolutionary France into a land of graves and prisons, authority enough can be found in favor of human liberty in its most unqualified, unlimited and baleful form. Those who installed in the place of Jehovah the Goddess of Reason, and erected temples for her worship; those who worshipped liberty in the bloody sacrifices of the guillotine, and executed justice with the sudden informality of the lantern, were too pure, too conscientious, too scrupulously just, I admit, to allow personal restraint, however useful to the subject or to society. If you would take to your bosoms the wild enthusiasm of these men for what they called human liberty—the liberty of trampling upon law, upon social order, upon all sacred things—and install as divinities to be worshipped, the selfishness, pride and arrogance of the human heart, you will probably find it quite easy to establish that the most monstrous injustice is perpetrated by holding any human being in any kind of subjection, even for an hour. In the light of their morality it may seem that of all restraints upon liberty, the least tolerable is that which flows from the first union ever formed—that union over which God himself presided—the nuptials of Eden.

The teachings of these insane zealots do not form sources of our law.

I pass from the question whether the Judaical dispensation, the Christian religion, or these together, as the one may bear upon and modify the other, form any part or source of the common or fundamental and original law of this State. Take it either way, the result must be the same.

An allowed source of our law is the usage, or common law of the mother-country, England. That usage, or common law, so far as applicable to their condition, was imported into this State with the first settlers.

Let us look, then, to the Common law of England, which was thus imported into this State. We are told, and that enemy to the white man's liberty, the great Lord Mansfield, is constantly referred to as having asserted that the common law of Great Britain, the parent state, did not

recognize and was fundamentally hostile to slavery. I speak as if the English settled this State. That, I believe, is a proposition of law undeniable in this court, whether in point of fact it is true or not. We expelled the Dutch Government on the strength of that assertion; and, therefore, treating England as the parent-state, we must assume that the law of England is the basis of our customary jurisprudence. Now so far from the fundamental law of England being opposed to slavery, *white slavery* formed an essential and integral portion of the common law, and that institution never was abolished by legislation. It merely ceased; when, where, or how, no man can tell, and no historian will venture to relate. It wore out; it was a thing unsuitable under given circumstances, and it ceased to exist when those circumstances came into being. It wore out as England grew wealthy, powerful and enlightened. If there had been a race of political abolitionists in that country, to make it a political hobby—to seek office through excitements concerning it—perhaps the question of its expediency might still agitate the English mind, and at the present hour we might have one half of that nation held in slavery by the other. But there were none such: and the silent, unseen, and now untraceable but gentle operation of those causes which, in good hands, conduce to the improvement of our species, had the effect. All Englishmen are free. That glorious and beautiful race—the “Angles,” whom Augustine, in the Roman slave-market, pronounced “Angels, indeed, and worthy to be the Angels of God.”—are all free. Without one drop of blood having been shed for their deliverance, without one single violent harangue in their behalf, without a single act of violence, without even one “John Brown” having been canonized as an immortal for martyrdom in the cause. It was a cause that needed neither Apostles nor Martyrs. The peaceful members of a civil society who merit equality, need no such aids; they need only to be saved from the hostile influences of self-constituted championship.

I am aware that this argument will be used upon the other side, to a certain extent—not to excuse or palliate political agitation, but to show that slavery is a bad thing. I admit that the slavery of equals by their equals is repugnant to an enlightened sense of what is proper and beneficial. I fully admit that; for I do not choose to be misunderstood in any part of this argument. It is clear, then, that slavery was not inconsistent with or repugnant to the common law of England, and it might very well have been imported to this State. But I admit that it was not imported. It had been pretty much, if not wholly, worn out at the time this State was settled; and it was altogether unsuited to the condition of our country. It was never carried hither by the English emigrants; it was never introduced or used. Still it is manifest that there is no principle in the English common law, which inhibits slavery, as immoral, or unjust, as repugnant to natural right or to divine law. No such prohibition existed in the common law of England before the settlement of this colony, or was brought hither by the first settlers. They did not indeed bring with them English slavery, but they brought hither no positive enactments or customary law forbidding it; nor did they import any legal principle conflicting with it. Thus the judicial history of this colony begins. The colonists had no law for the establishment, creation, or perpetuation of slavery; but neither had they any law nor any legal principle which was in any respect hostile to it.

We next find that in the very inception of their jurisprudence, the colonists created this condition or *status* of domestic slavery for the inferior races just as they introduced the apprentice system for the whites.

In the earliest stages of our existence as a people of which any traces can be found in history or tradition, negro slavery was recognized as just and lawful in this colony. Negroes were held in bondage without a doubt or a scruple as to its justice or morality. Another race, indeed, were also held in bondage. That fact presents rather an unpleasant picture—one I am free to say which I do not contemplate with pleasure, and which a generous sen-

timent might well lead us to wish never had been exhibited. The original lords of the soil were thought not too elevated to become bondmen, and they too were held in slavery. They were unfit for regular labor; and I must admit that the attempt to force the habit upon them was a very useless and a very cruel attempt; but still neither this court nor any other judicial tribunal has authority to condemn it as unjust or immoral. Time and experience demonstrated its impracticability; it is a thing of the past.

It will be seen, therefore, that in its origin, our law did not receive from any quarter as one of its elements, any principle repugnant to slavery, as a civil institution. We received none from divine authority; we imported from England no prohibition of slavery, and the moment we began to make laws and to lay the foundation of our social order, we established for ourselves as a useful civil institution the *status* of negro slavery.

And now I ask what is there of legal authority from which to draw the general conclusion, as a preliminary to my friends' construction of this statute, that negro slavery is unjust? They have indeed some very high sounding names upon their points. They have Lord Mansfield's celebrated opinion in the case of *Somerset*, reported in the *State Trials*, and in other places. But to that opinion very little respect is due. The case was argued by Mr. Hargrave, one of the most learned and astute lawyers that Great Britain has ever produced. He was on the side of liberty, as it is called; and a more amusing or entertaining study cannot be placed before the eyes of any fair and reasonable man than that argument. Its reasoning and its conclusion were adopted by Lord Mansfield in language more flowing and elegant indeed, but not by any means so instructive. Lord Holt and Mr. Justice Powell were Mr. Hargrave's high authorities for the proposition on which all his reasoning was based. It was that whilst the common law of England recognized white English slaves or villeins, and the right of property in them, yet it "took no notice of a negro." These judges held that the common law of England had no condition either of citizenship—(I use that term as best conveying the meaning) either of citizenship, denizenship, or bondage for him. What the common law of England had not declared, could not be created by private authority or introduced by judicial power; and it followed of course, that it would require a positive enactment of the legislature to fix upon a negro the character of slave in England. The force of that argument admitted of no answer. It was complete; it was logical; it was sound; it rested on as firm a basis as any argument ever heard in a court of justice. My Lord Mansfield, however, with that eloquence for which he is distinguished, thus turns this very intelligible little piece of English technical learning into a high-sounding and misleading dogma. "The state of slavery," says he, "is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law;" and my Lord Mansfield has been the patron saint of abolitionism from that time to the present. Perhaps he has been eclipsed at last. Your Honors will perceive that Lord Holt and Mr. Justice Powell were cited for the proposition, that whilst the common law of England recognized white English slaves, or villeins, and the right of property in them; yet "it took no notice of a negro." That a white man might be a villein in England, but "as soon as a negro came into England, he became free." On the strength of this small argument, after it had been aired in the lofty diction of Lord Mansfield, still higher flights of fancy were taken. Orators and essayists then told to the admiring world the wondrous love of freedom inherent in the common law. The moment, said they, one breathes the air of England or touches its soil he is free. A greater falsehood could not have been uttered in reference to white men. By that very common law they had been for centuries bondmen of that soil, and had constantly breathed that air without its working their deliverance. The air of England never had this enfranchising, liberating effect, until it was breathed through the nostrils of a negro. It made the negro free, but had no such effect upon the white man.

Any lawyer will admit that this doctrine of Lord Mansfield was the merest of truisms; what is not known to the existing law cannot be incorporated into the national jurisprudence, except by the legislative power. He decided no general principle; he merely gave utterance to one of the smallest of every day technical commonplaces. What the law has not admitted and recognized, cannot be declared by the court. For such a purpose we need the aid of legislation; and therefore while those of Lord Mansfield's own race might possibly be held in bondage within the realm of England, the negro was *below* that condition, and could not be so far honored by the law of England as *even* to be recognized as a slave? It "took no notice of him."

I have referred your Honors to as high an authority on questions of law as Lord Mansfield himself, for a review of this magnificently worded opinion. The great Sir William Scott, Lord Stowell—when giving judgment in the case of the *Slave Grace*—severely criticises it. His forms of argument and expression but thinly veil the contempt which he evidently felt for the opinion in Somerset's case. Lord Mansfield was generally employed in what may not unjustly be called the narrow sphere of mere municipal law; but the great mind and extensive learning of Sir William Scott were employed during his whole public life in the investigation of questions affecting the interest of whole empires and races. His researches familiarized him with the history of the past, and led to profound contemplations of the mighty future. He was judge of a court which dealt with the law of nations, and the great fundamental principles of natural justice. In a word, his was a mind prepared for and habituated to the investigation of the greatest questions which can occupy the reflections of a legislator or a judge. Even in the knowledge of general literature, and in power to set out the truth in forms the most beautiful and captivating, Lord Stowell stood not at all behind Mansfield, who I must admit was a distinguished lawyer, and also, as one of my learned friends said in the court below, a poet. Perhaps the latter fact may account for the distinction attained by his judgment in the case of Somerset. Certainly so much of it as was law had but little significance, while so much of it as was poetry has had considerable effect; it has won for him much unmerited applause.

It will be seen, then, that from the jurisprudence of England, we can derive no argument in support of the general proposition advanced by the other side. We are told, however, that negro slavery is contrary to natural justice. No, that is not exactly the form of speech generally employed, nor is it the form adopted in the judgment from which this appeal is taken. It is contrary, say the other side, to the law of nature—as if there was some such thing as a law of nature to be recognized and enforced by courts of justice. The references in support of this conceit are about as apposite as Lord Mansfield's paraphrase of the English common law. We are referred to the ancient civil law, or rather to the comparatively modern civil law, the compilation framed by Justinian, or under his administration. A passage is thence extracted, which as it is commonly translated, seems at first blush to express the idea that slavery is contrary to some binding law of nature. Your honors will find on a careful examination that such is not the import of the text. Taking the whole book into consideration, it is quite clear that the words *contra naturam* in the place referred to, mean only that slavery does not exist by nature or in nature. That important piece of knowledge might about as well have been withheld, or at least reserved for its proper place in some treatise on physiology. Other authorities, equally high, tell us (to which we have referred in the points) that no kind of property exists in nature, or by nature; and I do not see any difficulty in admitting that proposition. Property is altogether a matter of civil institution. Laws and governments are matters of civil institution. They do not come by nature. But the same civil law authority which is cited against us, organizes and regulates the institution of slavery, and practically demon-

strates its admitted lawfulness by complicated and elaborate provisions for its protection. That, too, was the slavery of white men equal in natural gifts with those who held them in bondage.

There is no more to be found against domestic slavery in the Justinian code than in the Bible. Both sanction it, as I suppose. Certainly the former does: it contains the most positive recognition of the state of slavery and the most ample and effective laws for its enforcement. These form the most palpable demonstration of its lawfulness and of course of its justice in contemplation of law.

We may next look to that great code which is of binding force though enacted by no direct legislative authority, the law of nations—the voluntary law of nations. As to this, suffice it to say that the courts of England, our mother country, and the highest court of our own country, the Supreme Court of the United States, by the unanimous voice of the judges, the organ of the latter being John Marshall, one of the greatest of lawyers, and purest of men, have decided that holding negroes in bondage, is not contrary to the law of nations. Nay, they have gone further. These high tribunals have expressly decided that however particular States may legislate against it and thereby render it unlawful in their own subjects or in those bound by their municipal laws, yet, even in its most abhorred form, that of the slave trade, it is not repugnant to the law of nations. That very point is solemnly decided by the courts of the mother country and by the highest court of our own country. For this we refer to two direct adjudications—the case of the *Antelope* in 10th Wheaton's Reports, and that of the slave *Grace* before Lord Stowell. Thus it will be seen that my friend's cannot find in the law of nations any such principles as they contend for. Where else, then will they look for it. Perhaps they will rely on what they call the law of nature; and we will not pass unnoticed the singular appeal which has been made to that authority. But we shall deny the existence of any element in our practical jurisprudence which has ever been known by that name or which can properly be so designated. Certainly there is such a thing as natural justice; and it must be admitted that the Creator has gifted every one of us with a sure means of ascertaining its principles. That means is the exercise of an honest and enlightened understanding. I not only admit but I insist that natural justice thus ascertainable is a law to the conscience of every man, and that, as such, it is superior to all laws enacted by human authority. Though human laws may make that unlawful and immoral which was before innocent, I must admit, and I do insist, that it is not a function of human law to sanctify or render just that which, in its own nature, is immoral and unconscientious. It is not in the power of any human law however enacted or constituted to make lawful—so that a man can practise it with honor while he lives, or with a hope for salvation when he dies—that which, in its own nature, viewed by the light of a pure and honest understanding, is contrary to morality. What is contrary to conscience, and contrary to that natural justice with a knowledge whereof the Great Father of us all has endowed every reasonable and intelligent member of our species, may not lawfully be practised, however sanctioned by human institutions. I hold to that doctrine; and in that sense I do maintain that there is a higher law and to that higher law—above and before all human laws—I avow undying allegiance. We must revere God before man; and it cannot be within the power of human governments to make lawful that which God himself has forbidden. And I do say further, that the human understanding, in its ordinary perfection, can see into and detect injustice and wickedness even when enshrined in the nominal sanction of human laws and that every honest man is bound to oppose such laws by all the means in his power. I speak of the individual citizen in his private and personal capacity as a reasonable being, possessed of free will, responsible here and hereafter for the use of his faculties. I am not maintaining that a judge presiding over a court of justice who has sworn to maintain the

constitution, as it is written and adopted by his country, has a right, in the exercise of his judicial power, to employ this natural understanding of justice in opposition to the law of the land and by his official decrees or acts to overturn or violate the law of the land. I maintain no such doctrine. But whenever a judge finds that he cannot be faithful to the official oath he has taken, to the constitution under which he holds his office and, at the same time, act according to his conscience and to the commandments of his God, it is clear that he should resign his station. And this principle applies not only to judges but to all public officers and most especially to legislators.

What I mean as to the office of this higher law is, that it does imperatively bind all men in their personal and individual capacities. A man who knows that the law under which he live violates the first principles of natural justice, and offers a sanction to that which is a deadly sin before God and to the conceptions of every honest conscience, is bound to strive by all honorable means to break down and defeat that law. Among these honorable means is the right of armed resistance—the sacred right of revolution. This principle alone it is, that sanctions the employment of the sword, the shedding of blood and the perpetration of what in the particular instance may seem harshness and cruelty, for the attainment of great benefits—to ameliorate the condition of our fellow-citizens or of mankind in general. This is the higher law which sanctified the revolt of George Washington against the constituted authorities then existing in this country. This is a conception of the higher law which every man has a right to entertain. This is the law which sanctifies before God and man every honest and successful revolution that has ever been accomplished. And it is this right to recognize a higher law which enshrines in our memories with the halo of a glorious martyrdom every champion of liberty and justice who has perished in an unsuccessful attempt to obtain those blessings for his countrymen or for any oppressed people. The laurel wreath of victory surrounds the name of Washington. Ill-success, defeat, overthrow, and death, in an ignominious form, might have been his fate. Such was the fate of many who, in this respect, perhaps, were as pure and virtuous as he. We revere the name of Emmet; we revere the name of Wallace. I will not further traverse history to recall its battle-fields or its scaffolds in the instances where oppression prevailed; it is enough to say that we revere the name of every virtuous man who has perished in unsuccessful attempts to achieve the independence of his country. We revere the name of Kosciuszko and thousands who failed in efforts like his, without attesting their faith by the sacrifice of their lives.

And, therefore, if negro-slavery be a thing so unjust and so wicked as my friends and their associates esteem it, I must admit that we cannot consistently refuse the same tribute to the recent abolition martyr, John Brown. He fell! So have many illustrious champions of justice. He failed! So did Emmet, and so did Wallace. His means were inadequate? So were theirs: the event proved it. He struggled indeed for the liberty of a distant people, who were not his kinsmen, who were not of his color, who had few claims upon his sympathy, and none upon his affections. That may be an argument against him with those who think that heroism and virtue should never be disinterested; but it has no real weight.

We have not been in the habit of withholding our meed of praise from Kosciuszko, Pulaski, De Kalb, or La Fayette, all of whom fought, and two of whom perished for us. We withheld not our tribute of admiration from Lafayette when, in his old age, he visited our country. No one asserted that he should have stayed at home instead of coming in aid of a remote and distant people, and imperilling his life for their emancipation. No! we received him as the people's guest, and the whole American nation, from one end of our republic to the other, bowed down in heartfelt homage to his virtue.

How can my learned friends, with their avowed principles, withhold from John Brown the tribute of their admiration, or from his deeds the sanction of their approval.

It will be seen, therefore, that although it may have no place here, and cannot influence your Honor's official action, our argument involves no denial of the higher law. That so called law can have no place in your official action, but as a guide to your moral conduct, and a restraint upon your individual action, in my humble judgment, it is entitled to a place. If it was unknown to you and unrecognized, that a law exists higher than man's law, and beyond man's control, you would be unfit for the high station of judges. If you do recognize that principle, and, recognizing it, believe that the laws and the Constitution which you are officially pledged to administer are repugnant to it, it is your duty, as men, to relinquish your offices.

I admit that natural justice, which is recognized by all enlightened men, is a standard by which negro slavery may be tried by man in his private and individual capacity. But a law of nature, that would enable a man to hold office under a Constitution which recognizes slavery, and at the same time would enable him to pronounce it unjust, and officially to act against it and defeat its operation, cannot be recognized in any tribunal. The idea is paradoxical.

In order to demonstrate this position, we have stated in our points that "If there was any such thing as a law of nature in the forensic sense of the word *law*, it must be of absolute and paramount obligation in all climes, ages, courts and places. Inborn with the moral constitution of man, it must control him everywhere, and overrule as vicious, corrupt and void, every opposing decree or resolution of courts or legislatures. And accordingly Blackstone, repeating the idle speech of others upon the subject, tells us that the *law of nature* is binding all over the globe; and that no human laws are of any validity if contrary to it."

Now, will my friends say that the language of Blackstone upon this subject is anything but paradoxical nonsense? That author seems merely to have re-written the dogmas of "Doctor and Student," giving no thought to the subject, and merely dressing the ancient text in a modern and elegant garb. That old book has been constantly cited as an authority in our law for about three hundred years. It tells us of the law of nature that "It is preferred before the law of God; and it is written in the heart of every man, teaching what is to be done and what is to be fled; and because it is written in the heart, therefore it may not be put away; ne it is never changeable by no diversity of place, ne time; and therefore against this law, prescription, statute nor custom may not prevail: and, if any be brought in against it, they be not prescriptions, statutes nor customs, but things void and against justice." *Dialogue* 1, ch. 2. This is indeed a higher law. I believe in a higher law as I have presented it; but in the shape in which this old elementary work, and in which Blackstone, our leading modern commentator, and many other law books present the law of nature, allowing it to ride down statutes, and that, too, by judicial action, it is wholly inadmissible in any judicial forum. Blackstone must have transcribed this doctrine without giving its soundness a thought; for it is absolutely inconsistent with his familiar assertion in the same work, that Parliament is omnipotent.

The "Doctor and Student," contains some observations which imply a consciousness that it was difficult to administer this law of nature. He says the judges do not speak in that manner, but say of a void usage that it is "against reason," and therefore unlawful. This would seem to be better authority for a propagandist of infidelity than for Mr. Justice Blackstone or for decision in this case. I pronounce an appeal before a judicial tribunal to any such pretended law of nature as in the last degree unsound and irrational: it is a figment of the imagination. What we find in our law-books about the law of nature, is in mere elementary writings and is almost

invariably put forth in passing ill-considered remarks and in a very crude and general way. The law of which they speak has no practical influence or operation, and the writers who speak of it seem usually to have had no definite ideas concerning it. Grotius and Carlyle are indeed exceptions to this remark. (See 1 Cobb's Law of Slavery, p. 10, § 9.)

Grotius defines the law of nature as, "the dictate of reason by which we discover whether an action be good or evil by its agreement or disagreement with the rational, social nature of man." How shall we ascertain what is the dictate of reason, but by referring to common experience? Let us then look into general history and general jurisprudence. In this search we shall find that by the law of every civilized state on the face of the earth negro-slavery is in some form, recognized as lawful in itself.

If a question of property where the title had its foundation in the ownership of a negro-slave should arise even at this day, in the most fanatical state of this Union, the title would be unhesitatingly recognized. As for instance, if a Virginian should sell his slave to his next door neighbor in Richmond, and afterwards should bring an action for the price in any civilized country on the face of the earth, he would recover. It could not be an answer to his action to say "you committed an oppressive act, contrary to natural law, to natural justice, to reason—and you cannot recover the stipulated reward for your misdeeds." On the contrary, there is no State in this Union in which the laws do not recognize the general lawfulness of slavery as a basis of legal rights. Yet *ex turpe causa non oritur actio* is a maxim never departed from and universally acknowledged. If we look to the history of the past, we find slavery was recognized and has existed in all ages, in all climes and under every form of religion. We find it now capable of being recognized and enforced in the common law of England, and in that of every State in our Union as a foundation of title. Therefore the weight of authority is with us on the point that slavery is not, in its own nature, an unlawful thing. We have as authority for our position that it is not evil *per se*, the voice of all mankind in past ages, and of all portions of mankind amongst whom law is administered at this day.

It may be enacted that one shall not hold a slave in a particular State; but the general proposition that slavery is unjust in such a sense, that judicial tribunals are bound to treat it as repugnant to natural law, and to deny all rights of property growing out of it, not expressly created by the local law, finds not a living advocate entitled to respect, and not one single judicial authority—I mean one single judicial decision. Some of the ravings of certain persons may indeed be found tending in that direction; but it has never been determined by the judicial tribunals of any country that any right otherwise perfect, loses its claim to protection by the mere fact of its being founded on the ownership of a negro slave. The proposition that freedom is the general rule and slavery the local exception, has no foundation in any just view of the law as a science. It is one of the fraudulent catch-words of the day, contrived for the worst of purposes and never employed by good men, except when laboring under a delusion.

It is said in the opinion pronounced below, that the reason why the property of a stranger when travelling through our territory is recognized and protected, is, that property exists by the law of nature. I think I have shown that it does not exist by the law of nature, but quite the contrary. The title to property always arises from some local law—the law of the country in which the property is acquired. The right of the individual to that property, when outside of his own territory, and within another civilized state, depends upon what is called the comity of nations. The State in which he is temporarily abiding, recognises his right of property as an act of comity toward the state of his domicile. The condition of a stranger coming from another State who is the owner of a slave in respect to his property in the services of the slave, is exactly the same as his condition would be if he were the owner of a horse or the owner of a barrel of

flour under like circumstances. We ought to respect his right of property in any of these, while he is a way-farer and a stranger in our territory, out of respect to the laws of his country and out of respect to the obligations which we have assumed toward those laws. The comity of nations binds us so to treat Englishmen, the Constitution of the United States binds us so to treat our fellow-citizens coming from another State.

I therefore maintain that property in African negroes is not an exception to any general rule. Upon rational principles it is no more local or peculiar than any other property. And I have shown that there is so much of universality about, it that in no civilized State or country could it be absolutely denied all legal protection. Let this suffice as to the juridical question.

We have made a point touching this institution, as to the abstract question of its justice.

[Here Mr. O'Connor read the fourth division of his first point, to and including the letter (f.), in the second subdivision of the same. He then proceeded as follows:]

We are told, that there are no white men in the land of the negro. Well, I agree to that. It is true in a general sense. Neither is there any civilization. I am aware we will be told that there is a kind of partial civilization in some places; but, as a general proposition, it will be found that there is no civilization. A very few words—barbarism, brutal masters, and brutalized slaves—describe, in plain terms, the condition of the whole African race in their native clime.

It is said, they have not had the same advantages as the whites. History does not prove any such fact. I have not in my humble researches, been able to discover that a knowledge of the arts, or that any secular learning whatever has ever been taught to mortals by direct inspiration or miraculous revelation. The men of past times, who are looked upon as the oracles of Almighty God, who spoke *His* word to us, even if we should include the Saviour himself, were not, as far as I have ever been able to discover, teachers of secular knowledge: they spoke of things spiritual; they addressed themselves to the heart and to the conscience of man in reference to his spiritual nature. Man was left to work out the problem of human progress in human things; of improvement in material knowledge and material prosperity, by the exercise of his own understanding. Even Joshua, when he struck men with astonishment by a miraculous change in the order of nature, evinced, in the language of his mandate, a total ignorance of astronomy. The Saviour did not select as teachers of his Gospel, those who were gifted with worldly knowledge. In looking back upon the supposed origin of letters, and to the earliest seat of learning, we are led into an infidel clime, where the true God was not worshipped, and amongst a people who, though not of the negro race, were their next-door neighbors. Hence it would seem that in relation to mere worldly knowledge and external facilities for acquiring it, the negro race had quite as good an outfit as the white race. In respect to mere opportunities for acquiring knowledge of the arts and sciences, they were not stepchildren of fortune. Unless we shall impute it to inherent incapacity of mental structure, we shall find it as difficult to say why they have not become enlightened, as it is difficult to say why they are negroes, if, indeed, like ourselves, they are descended from the beautiful pair who once dwelt in the garden of Eden. They have existed, certainly, a very long time, and their progress has been very slight. I do not know that they can be said to have made any progress. If they have, certainly it has been through the beneficent operation of the slave trade, and their pupilage under the system now established in the slaveholding States of this Union. There, and there alone, have negroes attained to anything like a comfortable state of existence. Through these instrumentalities alone have any of the race attained the blessings of civilization, the light of Christianity, and the advantages which must ever follow as consequences from these, even to the lowest types of humanity. I say this without overlooking Hayti, Liberia, or Sierra Leone, and some few other

recent experiments. Indeed, Africa might well be looked upon, not as the true home of the negro, but only as the place of his production. That continent seems to have been, in reference to the negro, very much what the quarry is to the architect or the sculptor—a place whence to draw a crude material, useless in its native state, but susceptible, under wise control, of being made useful to the human family. [Sensation.]

Admitting the inferiority of the negro, it will be claimed that, nevertheless, he ought to be free—that he has a natural right to freedom. I suppose all men have a natural right to whatever is attainable by the fair employment of their faculties, and is good for them. But it remains to be seen whether the negro has a natural right, or any right, to political and social freedom in our society, or indeed anywhere; and whether he is not benefited in the highest practicable degree by being kept in subjection. I maintain that justice is a system of mutual equivalents, that wherever any benefit is received from one individual by another, a due return ought to be made. I say, therefore, that to the black man, when held in slavery, the white man, his master, makes a due return. He treats him precisely as the more intelligent must and should treat his dependent inferior. Occasional violations of propriety do not affect this question.

[Here Mr. O'Connor read from subdivision three in the fourth division of his first point.]

I maintain that there is no injustice in the state of pupilage to which the colored man is subjected by this institution. On the contrary, the greatest blessings which his nature is capable of enjoying are attainable under it. According to all the evidence of history, and according to all fair reasoning from the circumstances to which I have referred, these blessings could not be attained without that system of pupilage. Again, I maintain that such a basis as is claimed for the argument on the other side, does not exist, and of course it cannot be proven by authority. Negro slavery conflicts with no general law which has ever been recognized. It conflicts with no law of nature which has any authority among men; and lastly in its own characteristics it is not in conflict with any principles of natural justice that are perceptible to a sound mind. It is a source from which might be derived the greatest blessings to millions of the negro race; and it is by no means credible if we will be enlightened by the history of the past, that any considerable number of the race could attain an equal measure of enjoyment without it.

This brings me to the mere question as to the Constitutional validity of this particular statute.

[Here Mr. O'Connor read the Fourth, Fifth, and Sixth of the appellants' printed points.]

In its own nature Negro slavery is not the kind of institution that should alarm the reason and the conscience of this Court; and, in this view of the subject, I ask, that such a construction be put upon this statute as will not take from our fellow citizens of the slaveholding States, the privilege of passing through our territory. I maintain that the State of New York cannot without violating the Constitution of the United States, restrain the citizens of a sister State from peaceably passing through her territory with their slaves or other property, on a lawful visit to a State where slavery is allowed by law. Congress has power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." This power is absolutely exclusive in Congress, so that no individual State can constitutionally enact any regulation of commerce between the States, whether Congress has or has not exercised its power over the particular subject in question. Commerce between the States includes the right of transit for the citizens of the several States to pass through the other States. This right is also included in another express provision of the Constitution of the United States, to which we have also referred upon the points: "The citizens of each State shall be entitled to all privileges and immunities of

citizens in the several States." This means of course, the privileges of citizens of the United States. It does not mean the privileges of citizens of the particular State in which they are wayfarers, or of the State in which they are domiciled, but the general privileges of a citizen of the United States. To protect these privileges the Supreme Judiciary of the Union is vested with jurisdiction of all controversies between citizens of the particular State in which the controversy may arise and a citizen of any other State.

Thus, it will be seen, that the citizen of Virginia, when travelling through this State, carries with him, not the privileges, to be sure, of his citizenship in Virginia, but the general privileges of a citizen of the United States; and he also carries with him, as a shield for the enforcement or rather for the protection of these privileges, the right of appeal to the constituted authorities of the United States, whenever by any local rule or regulation whilst passing through or temporarily staying within our borders, his rights are improperly interfered with. Intercourse is a part of commerce, and he is guaranteed by the Constitution that the laws affecting him in relation to his possessions whilst thus travelling through our State, must be laws passed by the Congress of the United States, and not the laws of this State. We claim that under these various provisions of the Federal Constitution a citizen of Virginia has an immunity against the operation of any law which the State of New York can enact, whilst he is a stranger and wayfarer, or whilst passing through our territory; and that he has absolute protection for all his domestic rights, and for all his rights of property, which, under the laws of the United States, and the laws of his own State, he was entitled to, whilst in his own State. We claim this, and neither more nor less.

That the States may pass police laws to prohibit any one from carrying within their boundaries anything which may be dangerous to health; and that they may protect their own citizens by refusing to permit to be carried within their borders any person or thing having a tendency by contact to affect or deprave public morals, is not to be denied. That they have a right to forbid trading within their limits, as, for instance, the buying or selling of negroes, of corn, or of anything else under certain circumstances, need not be denied. If a Virginian, with his property held under the laws of Virginia, in passing through this State, brings with him anything which may be dangerous to morals or to health, or which may be in any way immediately detrimental to the people, the right of self-preservation entitles us to repel the mischief. But, except in such cases, the State cannot interfere with the traveller, deprive him of his property or break up his domestic arrangements and relations. If the States possessed such a power, there is no limit to which it might not be carried. The act of passing through a State, might work an immediate annihilation of the relation of husband to wife: it might immediately abolish the subjection of the minor child to the parent. I suppose if we should by and by have the territory of Utah incorporated with our Union as a State, it might pass some laws of this character.

It is not pretended that this State has the right to forbid a Virginian from passing through our territory. But does it not virtually prevent his passing through, himself, if it forbids him to carry with him his social relations. We might as well pass a law that he should go through naked, as to strip him of the use of his property, by saying that certain parts of it shall not be brought within the State. To strip him of his means in passing through, is virtually to make him pass through naked.

We were sensible of these principles in the infancy of our State legislation, and we acted upon just views of them. We gave these southern people the privilege not only of coming into our State, but of staying a reasonable time in it, without interfering with their privileges.

We have referred your Honors upon our points to decisions of the Supreme Court, in which it is asserted that the whole subject of intercourse comes within this power of Congress to regulate commerce between the States.

The statute of 1841, if it is rightly construed by the Court below, attempts to regulate commerce so far as to prevent the Virginian from carrying his slaves through our territory. And certainly this is a moral force, which operates virtually to deny a transit to the masters themselves. If they cannot pass across our territory with their ordinary comforts—with the means of subsistence, and surrounded by the advantages to which they are accustomed—constituting to them a large portion of the pleasures of existence, the mere privilege of personal transit is of little value to them. We have certainly hemmed in the negroes; and if we have not already hemmed in their masters, we may do so by more stringent provisions, in case this law is to be construed in the manner in which it has been construed, and is held to be constitutional. The mere comity of nations toward each other leads to a very high respect being paid to the rights of property and to the social condition of the people of foreign nations. We allow them to pass through our territory with their property, and with their rights unimpaired. This is merely through comity; that is, the understanding which has grown up between civilized nations, that they shall thus treat each other and thus accord to each other the rites of hospitality. This comity extends so far, that according to the ordinary law of nations, a neutral will allow armies to pass across his territories—even the armies of one belligerent marching to invade another. This has been allowed, notwithstanding that it subjects the neutral territory to considerable inconvenience, and in some degree endangers its neutrality. Where it does not introduce something absolutely detrimental to peace, comfort or health, comity enjoins that a State should not interfere at all with the condition of the stranger passing through her territory. This is by virtue of a general practice, which from long use, has become an understanding or compact.

Now, I do not claim that this thing, called comity in its ordinary sense, has much if anything to do with the relations existing between these States. Quite the contrary. Comity grows out of a compact or bargain assumed to exist. So far from these States having any right either expressly or by implication to enter into compacts of this sort, they are positively forbidden to do so, except by consent of Congress.

I apprehend that the comity which did exist between these States at the adoption of the Constitution, when they were entirely independent, was incorporated into the Constitution, and by force of that instrument, put into a permanent form. I do not mean that the proper authorities might not alter the Constitution itself; but I trust that is a power never to be exercised. Founded by wisdom that might well be revered as divine, it is calculated to secure to this nation through all time such great advantages, that I trust not only every word and syllable, but every letter may be ever regarded as too sacred to be altered. It settled and fixed the relations between these States as they existed when the instrument was adopted. New York cannot say to Virginia, I will not concede to you the privilege of transit. Such an act would be an act of contumacy to the Constitution. While the Virginian is a stranger and a wayfarer, the Constitution secures to him as the rights of a citizen, all that the original comity gave him as a stranger, when "stranger was a holy name." The Judicial Courts of the United States are ready to enforce all this at his demand, if the State or any citizen thereof shall invade. He cannot lose or relinquish any part of these rights, except by ceasing to be a Virginian. This of course he may do, by settling amongst us, and thereby becoming a citizen of New York.

On these grounds, I respectfully insist, that if this statute is to be construed in the large sense that is claimed upon the other side, it is positively repugnant to the Constitution of the United States. A brief recapitulation, and I shall close.

I maintain, that at the time of the passage of this statute, there was nothing in the common law of our State, or in any prior statute which would enable the judiciary to pronounce any sentence of the kind now

claimed against the institution of negro slavery; and that no principles in our jurisprudence can justify the adoption of any such general idea by this Court.

The act must be construed merely according to the force and effect of the terms employed in it. These terms apply to the act of bringing a slave into the country to stay therein, not to the mere passage of an owner with his slave property. But if that act, upon a correct construction of its language, does forbid the Virginian to carry his slaves through the State, then I maintain that that act is a flagrant violation of our Constitutional compact, and is in conflict with its letter and spirit. The right to enjoy their slave property within their own territory, by a necessary consequence, secures to the inhabitants of slaveholding States a right of transit with their slave property through every State of the Union, and any statute of a State which interferes with that right, and either confiscates or enfranchises the slave, merely because the master has taken the liberty of carrying him through such State, is repugnant to the Constitution, and is absolutely void. If legislatures in States not directly interested in slave property may pass such statutes, and the Courts must enforce them, then this Union cannot very easily be preserved.

To test whether this is so, let us imagine a state of things. Two great communities, occupying co-terminous territories, are living together in external amity under the same common government and mutually coöperating in the administration of that government. One of these communities, ignorant of God's law, blind to the dictates of common honesty, and deaf to the voice of natural justice, sustains itself by holding in unjust bondage four millions of human beings, thus living in the daily practice of criminality the most flagitious. The other community is pure, honorable and virtuous in its life and manners. Its morality is above all exception, its sense of justice perfect. It looks upon the life and practice of its sister community with sentiments of unmingled horror and disgust.

Yet by the fundamental law which holds these communities together, it is provided that if any one of these four millions—these victims of tyranny and oppression—should happen to escape into its territory, the virtuous community will seize him, deliver him into the power of his oppressor, and thus consign him anew to the bondage from which God and nature had afforded him a deliverance.

This virtuous community, so unhappily mated, denounces in unmeasured terms, the guilt and profligacy of its associate; but continues the association—profits by it, pretends faithfully to observe the fundamental compact, and periodically, through its chiefs and head-men, swears fidelity to it.

If this virtuous community can obtain for itself any other appreciation by the general society of mankind, than that of being scandalously hypocritical—far less worthy of respect than the vilest open contemner of justice and decency—then I admit that our Federal Union may be preserved even whilst one set of States shall carry on against the others, against their people and against their interests, such a social war as this case exhibits.

When all moral principles shall be thus lost sight of and consistency shall be unknown, anything, however vicious or absurd, will be possible. Trusting that we have not yet reached that low ebb, I ask your Honors, in deciding this case, to adopt the language of Lord Stowell, cited as our Seventh Point, "It is highly fit that the court below should be corrected in the view which it has taken of this matter, since the doctrine laid down by it in this sentence is inconsistent with the peace of this country and the rights of other States."

MR. BLUNT ON THE PART OF THE PEOPLE.

MAY IT PLEASE THE COURT:—It is not unfrequent in times when questions such as now disturb the public mind, enlist the feelings of the community to find them making their appearance in a judicial forum. Questions affecting human freedom or the claims of arbitrary power belong to Courts as well as to legislative assemblies. At the commencement of the Revolution in England, the great case of ship money brought before the Courts by Hampden, questioning the right of the king to tax without the authority of Parliament, was decided in favor of arbitrary power, and the decision of the Court was reversed by the people of England.

Two reigns after that, the great case of the Bishops again deeply moved the public mind of England, and the judges, better instructed by the history of the preceding generation in the laws and Constitution of their country, decided in favor of the freedom of petition and the rights of the subject.

A similar question arose at the commencement of our own Revolution, when the Officers of the British Government, seeking to enforce the arbitrary claims of the government, asked the courts for writs of assistance; and the judges, looking at the common law as in force in the Colonies, decided against the pretensions of arbitrary power and in favor of human freedom. A question of the same character arises in the case before the court, and the suitors on the record have had their cause espoused by two great States of this Union. The one, which in part I have the honor to represent, led the way to the formation of this confederacy by generously ceding to the United States her claim to the North-Western territory—a claim which, I say, after careful examination, was the only colonial claim that ever had a practical recognition under the royal government previous to the Revolution. The other party is a State, which in ceding its claims to that same territory, conferred, I may say, a still greater benefit upon the Union by making a conditional cession, so that after the North-West Ordinance was passed, it was made a condition of the compact between the State of Virginia and the Union, that that great and fertile territory should be forever consecrated to freedom; I am proud to say that the executive and the legislative departments of the Federal Government have, up to this day, scrupulously observed and fulfilled the obligation of the nation, so solemnly and deliberately contracted.

Such is the question, such are the parties now before the Court. And what is claimed by the appellant in the case? The claim that has been made is, that slaves shall, in violation of her laws and her policy, be brought into New York. That under the Federal Constitution she gave up all control over the subject when our political institutions were formed, when as a State she adopted that Constitution, she had that unquestioned, unsundered power. She then had no "irrepressible conflict" with Virginia, but went heart and hand with Virginia in laying the foundations of our government upon principles which were accepted by the whole American people—this State, led by Morris, and Jay, and Clinton, and Schuyler, and Hamilton, and Virginia led by Washington, and Jefferson, and Henry, and the Randolphs, and Mason and Madison, united with one mind in establishing the through and principles of our political institutions. There was then no "irrepressible conflict" between them as to the principles upon which these institutions were to be founded. If any has grown up since, it has not been from any departure from those principles by the State of New York.

It is now claimed, however, that the State of New York has no power to prevent the slave trade from being carried on through her territory; that the Constitution of the United States has forever prohibited the States from exercising any power that shall prevent such a trade; and that under that Constitution, wherever the federal power extends, property in slaves must be recognized, and that the flag—the symbol of the American people wherever

it is seen—shall be identified with the crack of the overseer's whip and the clanking of the fetter of the slave. It is against such claims that I contend, and I trust I shall be able to show, that neither the law nor the Constitution of this country will justify the Court in sanctioning such pretensions.

In the first place let us look back and see what then was the law—the law and general jurisprudence of the world—at the time of the formation of this government, as to the condition of the slave when taken into another State. It is not necessary to look at the Somerset case alone. At that period it was the law of the civilized world, that slavery was local—that slave property was recognized nowhere except in the territory where the local law made the man a slave; that the moment that slave went beyond that territory—the moment he was beyond that jurisdiction, that moment the chattel became a man; he was no longer a slave but a freeman, and the Courts of every country were bound to recognize him as such when brought by his master within their jurisdiction. The Court will see, by examining the several authorities set forth in the respondent's points in this case the following propositions fully established.

FIRST.—The state of slavery is contrary to natural right, and is not regarded with favor in any system of jurisprudence. All legal intendment is against it, and in favor of freedom.

Slavery is the ownership of a man under the local laws of a State where slavery exists. It is not derived from any compact or consent of the slave.

It originates in force, and its continuance is maintained by force.

According to the law of slavery, the children of the slave become slaves. His labor and all the products of his labor belong to his master, and that labor may be coerced, at the discretion of the master, by stripes, or any other punishment short of death.

Slavery requires a peculiar system of laws to enforce the rules of the master, which are irreconcilable with the jurisprudence of States where it does not exist.

The Roman law did not allow freedom to be sold.

Edict. Theod., §§ 94, 95.

The Greeks and the Romans both say that slavery is *contra naturam*.

Just. Inst., lib. 1, tit. 3; Aristotle Politic., lib. 1, ch. 3.

Jure naturale, omnes liberi nascuntur.

Just. Inst. lib. 1, tit. 2, § 1, Digest L. 1.

The learned and wise Fortescue, in his "Discourse to Henry VI," on the laws of England, says: *Ab homine et pro vitio introducta est servitus. Sed libertas a Deo hominis est indita natura.*—Cap. 42.

The right to a slave is different from the right to other property.

Vide Esclavage in Codé l'Humanité; 18 Pickering, 216; 2 McLean, R., 596; 18 Peters; 2 Barn. and C., 488.

SECOND.—The law of slavery is local, and does not operate beyond the territory of the State where it is established.

When the slave is carried, or escapes beyond its jurisdiction, he becomes free, and the State to which he resorts is under no obligation to restore him, except by virtue of express stipulation.

Grotius, lib. 2, ch. 15, § 1; ib., chap. 10, § 1.

Wiquefort's Ambassador, lib. 1, p. 418.

Bodin de Rep., lib. 1, cap. 5.4 Martin, 385.

Case of the Creole and opinion in the House of Lords, 1842.

1 Phillimore on International Law, 316, 336.

Long before the Somerset case arose in England, the judicial tribunals on the continent promulgated this principle.

In 1531, the Supreme Court at Mechlin rejected an application for surrendering a fugitive slave from Spain.

Gudelin de Jure Noviss, lib. 1, ch. 5.

In 1738. Jean Bourcaut, a slave from St. Domingo, was landed in France, and some formalities required by the edict of 1716 having been omitted, he was declared free.

15 vol. Causes Celebres, 3.

Before 1716, slaves from the colonies became free as soon as they landed in France.— Ib.

In this case the French tribunals declared that slavery was abolished in France by the introduction of Christianity.

In 1758, Francisque, a negro slave from Hindostan, was brought into France, and although the formalities of the edicts of 1716 and 1738 had been complied with, he was declared free, because those edicts had not been extended to slaves from the East Indies.

3d Denissart, Decisions Nouvelles, 406.

A Pole went into Russia, and sold himself into slavery; having been taken into Holland, he claimed his freedom, and was declared free.

Wiquefort's *Ambassadeur et ses Fonctions*, lib. 1, p. 418.

Phill. on International Law, 342.

Bodinus, in *De Republica*, cites two cases of the same character in France. One where a Spanish Ambassador brought a slave in his retinue, and in spite of all remonstrance he was declared free.

The other, a Spanish merchant, touching at Toulon, on his way to Genoa by sea, with a slave on board, and the slave was declared free.

Bodin. de Rep. lib. 1, p. 41.

In 1762, *Stanley vs. Harvey* (2d Eden. Ch. Rep. 126), Lord Northington held, that a slave becomes free as soon as he lands in England.

In the case of Knight, the negro, the Sessions Court, in Scotland, in 1770, held the same principle.

Fergusson's Rep. on Divorce, App. 396.

In the *Somerset* case, Lord Mansfield held, a negro who had been bought in Virginia, and brought to England, to be free.

20 Howell, S. T. 82.

In 1824, the doctrine was applied to thirty-eight slaves who came on board of a British man-of-war off Florida, having escaped from a Florida plantation. Admiral Cockburn held them to be free, and the owner, Forbes, sued him in the King's Bench for their value. Judgment for defendant, on the ground that they became free by coming on board a British ship, it being neutral territory.

2 Barn. & Cress. 448, and 3 Dowl. & Ryl. 697, §

Such was the doctrine of the common law, and it only conformed to a well-recognized principle in the jurisprudence of civilized Europe at the commencement of the American Revolution. Let me now inquire whether there was anything peculiar in this country to induce her to repudiate this doctrine at the time she assumed her position among the nations of the earth. What was the question between the colonies and the British government when the first Continental Congress was held? It was not alleged that there was any great actual oppression; because the duties that had been originally proposed were all taken off, except a mere three pence a pound tax on tea, and that assumed and paid by the East India Company in England. The rest had been abandoned, owing to the energetic action of the colonists, and the only point involved in the matter was one of principle. On one side, the British government asserted the right of parliament to bind the colonies in all cases whatever. Our ancestors met together. They saw what the doctrines of the British government were. They saw that they were founded on the principles of perpetual allegiance, hereditary right, prescriptive power and authority derived from precedent. They pondered deeply on the principles of government, and they promulgated their own principles, upon which they meant to stand or fall as a nation—to live or die as patriots and men. What were those principles?

In the very first act, the first law, that announced our existence as a na-

tion, they asserted the broad principle upon which our institutions are founded, that all men are created equal, endowed by their Creator with certain inalienable rights, and that among these are life, LIBERTY, and the pursuit of happiness. These are the principles set forth in that Declaration, and I shall hereafter advert to certain facts to show that these declarations were not inserted as "glittering generalities;" nor were they words without meaning; that the men who drew up that Declaration knew full well the import of the words they uttered, and they gave full weight to those words as they are understood in the common acceptance of mankind. But let me here advert to one fact. This Declaration is the very first act of our existence as a nation. The colonies did not become States as separate States. No legal or formal action had been taken by these colonies as separate States until the Declaration of Independence was promulgated, and when they declared their independence, they declared that independence as a united people—as one nation. What they proclaimed themselves, such they were recognized by the world, and if a public armed vessel, sailing from either of the States from that date, had committed a depredation on the commerce of a neutral nation, reclamation and complaint would not have been demanded and made against the State from which that vessel sailed, but of the Continental Congress, representing the nation known as the United States of America. The articles of confederation were not formed for years after the Declaration of Independence; and five years elapsed before those articles of confederation were sanctioned by the States. The Declaration, however, stood, and long before the confederation the people of the United States made a treaty with France. They assumed obligations as debtors for monies borrowed. They assumed general obligations to other governments as one nation, and not as separate States. Therefore, that Declaration, promulgated as it was at Philadelphia with the joyous ringing of that bell whose rim, by a strange and significant coincidence, bore the inscription—"PROCLAIM LIBERTY THROUGHOUT THE LAND UNTO ALL THE INHABITANTS THEREOF"—sanctioned as it was by all the provincial assemblies and the State governments as they were afterwards formed; read as it was by George Washington at the head of the army encamped round Boston, all of whom pledged themselves to stand by it—I say, that Declaration is the most authentic, the most deliberate, and the best sanctioned act of legislation that is to be found on the records of our country. From that day to this it has never been repealed, nor its validity, nor its strength impaired or questioned. It is declaratory and enactive.

It first declares the principles upon which our political institutions are to be founded, and then goes on to repeal and abolish all official authority, whether executive, judicial, or legislative, derived from the British crown, and to sever all connection between the United States and Great Britain.

That great act of legislation is still in force, and will endure as long as the nation exists.

On the face of that Declaration stands a principle which is entirely inconsistent with the views my learned friend has presented to the Court this day. But, it is said, that this is not its true meaning; and it has been said in high stations that it means quite another thing, that all men means all white men. Before, however, I go into an examination of that opinion, and of the contemporaneous acts of history, to show what it does mean, I will recapitulate the American decisions that have ratified the general principle of jurisprudence, that slavery is local. Since the Revolution, the question has often been adjudged in the Courts, and for the most part in the slave States, whether slavery is or is not local. In the year 1820, at the time of the Missouri Compromise, a case came up in Kentucky before the high Court of Appeals, where a slave, born in Kentucky, was taken into Indiana under the territorial laws, which allowed the introduction of slaves into Indiana without their becoming free. That slave was afterward brought back to Kentucky, where she claimed to be free. The court said,

that "in deciding this question, we disclaim the influence of the general principles of liberty which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable."

But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law. (2d Marshall Rep., 470, *Rankin vs. Lydia*.)

Again, "it is the right of another to the labor of a slave, whether exercised or not, which constitutes slavery, or involuntary servitude. The right, then, during the seven years' residence of Lydia in Indiana, was not only suspended, but ceased to exist; and we are not aware of any law of this State which can or does bring into operation the right of slavery when once destroyed."

It would be a construction, without language to be construed—implication, without any scrap of law, written or unwritten, statutory or common, from which the inference could be drawn to revive the right to a slave, when that right had passed over to the slave himself and he had become free—*Ib.*, p. 472.

In 1805, the Court of Appeals of Virginia held, that a Virginia slave, taken by its owner into Maryland, and kept there more than a year, became free upon being brought back to Virginia—that State having prohibited the importation of slaves.

5 Call's Rep., 430, *Wilson vs. Isbell*.

Hunter vs. Hulcher, 1 Leigh. 172.

In 1813, a slave, occasionally taken by his owner from Maryland, to work his quarry in Virginia, in all twelve months, was held to have become free by the Maryland courts, the law of Virginia having prohibited the importation of slaves. (*Stewart vs. Oakes*, 5 Harr. & Johns. 107.)

In 1824, the Supreme Court of Louisiana held, that a slave taken from Kentucky into Ohio to reside, became free; and that having become free, removal into a slave State with her master did not make her a slave again.

14 Martin's Rep. 401.

In 1835, the Supreme Court of Louisiana held, that a slave taken into France, and afterward brought back to Louisiana, became free.

Marie Louise vs. Mariot, 8 Louis. Rep. 475.

In 1816, the same court held, that a person claimed as a slave by a bill of sale executed in a free State or territory, must be deemed free, unless the right of conveying him out of that State could be justified, by proving him to be a fugitive slave. (*Forsyth vs. Nash*, 4 Martin, 390.)

Before the act of 1846, the courts of Louisiana always held, that a slave taken into a free State became free; and that he did not become a slave upon being brought back.

Eugenie vs. Prevel, 2 Louis. Annual R. 180.

Smith vs. Smith, 13 Louis. R. 444.

Virginia vs. Himel, 10 Louis. Ann. R. 185.

Josephine v. Poultney, 1 *Ib.* 328.

14 Martin, Louis. Rep. 401.

I will now allude to the decisions of Missouri because the local law of that State becomes of special importance in the examination of the Dred Scott case. The Supreme Court of Missouri in 1829 held that the actual residence of a slave in Illinois was sufficient evidence of freedom.

Milly vs. Smith, Missouri Rep. 36.

In 1833 they held that a slave taken through Illinois on his route to Missouri, but hired by a resident while there, became free.

Julia vs. McKinney 3. *Ib.* 193.

Then again in 1836 where an army officer took a slave to a post in the Northwest, the court held the slave to be free.

Rachel vs. Walker, 4 *Ib.* 350.

These decisions were all founded upon the maxim that slavery was the

creation of local law and that a slave became free upon his removal to a free State. Such was the law of Missouri as declared by all its Courts down to the decision in the case of Dred Scott, afterwards decided in the Supreme Court of the U. S.

In 1851, the Court of Appeals of South Carolina, in an action for the value of a slave, recognized the principle that a slave being landed in a free State became free, and that inasmuch as the person had taken that slave and landed him in a free State without the consent of the master, that master was entitled in an action to recover the value of the slave.

Ellis vs. Welch, 4 Pickens, 468.

In 1840, the General Court of Virginia held, that a slave taken by her master into Massachusetts and brought back into Virginia, was entitled to her freedom.

10 Leigh. R., 697, *Commonwealth vs. Pleasant*.

Betty vs. Horton, 5, *Id.*, 615.—In this case the Court held, that this freedom was acquired by the action of the law of Massachusetts upon the slaves coming there.

In 1833, Chief Justice Shaw held, that a slave temporarily brought by his owner into Massachusetts, became free.

Commonwealth vs. Aves, 18 Pick. R. 193.

In all of these cases occurring, except the last before the courts of slave States, the courts adhere to the doctrine that was existing in the public jurisprudence of the world, at the time this country became independent. Such was the law and they so declared it. The inquiry now is has there been any change?—has our Constitution made any modification in this universally public law?—is there anything in the Constitution overturning or reversing this law. What are its provisions on the subject of slavery? They are two only. One is a provision whereby the right of a State to allow the migration or importation of such persons as it shall think proper to admit, shall not be interfered with by Congress until 1808. This does not affect the question before the court. The other is that no person held to service or labor in one State under the laws thereof, escaping into another shall in consequence of any law or regulation therein be discharged from such service or labor. This provision is a recognition of the fact that without such a provision any slave escaping from one State to another would at once have become subject to the general jurisprudence of the world and have been made free.

If your Honors please, this which is usually termed the fugitive slave clause is a carefully worded provision. It may and undoubtedly does comprehend slaves—it may also comprehend apprentices, and redemptioners as well as slaves, and they have all been apprehended and delivered up under that clause of the Constitution. But what is the effect of that provision in the Federal Constitution? It is a recognition of the general rule of jurisprudence, that without that provision the general rule would apply and the slave would be made free when he escapes into another State. Limiting it to that particular case excludes all others. It imposes on the free States an obligation which is *limited* to fugitive slaves.

If slaves were recognized as property under the Constitution, this provision would be unnecessary.

The Constitution could not have excluded all other cases more clearly unless it had in so many words declared as the Convention in fact did by inserting this provision limiting it to one particular case, that the obligatory rendition of slaves was limited to escaping slaves. It was so understood at the time when that provision was introduced; and when the question came before the State Conventions for the purpose of ratifying the Constitution, Mr. Pinckney, in speaking of the provision said: we have gained the right to recover our slaves in whatever State they may take refuge, which is a right we had not before.

16 Peter., 648.

Charles Cotesworth Pinckney was a distinguished man, a patriot, and a leader of one of the two States which, in the federal convention, asked a concession from the Union in favor of slavery. South Carolina and Georgia, for the last three years of the Revolution, had been in the possession of the British troops, and had been subjected to peculiar injury and loss by the occupation of their soil by the armies of Cornwallis and Rawdon. Their representatives in the federal convention, among whom was C. C. Pinckney, strongly urged that they might be allowed to supply themselves with labor, which had all been taken away. This permission, mainly intended for those States to allow persons to migrate or be imported into such States as should allow such migration until 1808—a trade which was originally intended to have been at once prohibited—was, in a moment of concession, granted to them. This was the only concession to slavery, and this was to endure but twenty years, and was granted under urgent and peculiar circumstances. Before the adoption of that Constitution we were one nation as much as afterwards; and yet it was conceded by Mr. Pinckney and many others, speaking in the various State Conventions, that until that provision was incorporated in the Federal Constitution, when a slave escaped from one State to another, no power existed to reclaim him. Where, then, is the right to comity under the Federal Constitution? It provides for fugitive slaves, and for them alone.

By looking back to the acts and declarations of those who formed our government, we can ascertain what they meant; we can infer what was intended by these Constitutional provisions—whether they are to be construed and extended in any manner beyond the letter. The principle of the equality of man as such in his claim to justice, and his inalienable right to freedom was set forth in the Declaration of Independence; and I maintain that the contemporaneous history proves that at the time when our Revolutionary fathers unfurled their banner in resistance to the pretensions of Great Britain, they intended to carry out that principle in full;—that the principles announced in the commencement of the Declaration of Independence were “no glittering generalities,” but that they meant every word they used. I have already stated that the point in dispute between the government of Great Britain and the colonies, was that Parliament claimed the right to bind the colonies in all cases whatever. Our Revolutionary ancestors looked into the principles of government, and after examining them deeply, and pondering profoundly upon them, they determined to announce the principle to the world that man was entitled to self-government, as the groundwork of their political institutions. It was the American idea as contra-distinguished from the European idea, which was that government was a divine institution, that, with the King at its head, perpetual allegiance was due from the subject; and, with prescriptive authority and hereditary right of favored classes, a system of government was established which depended more for its support upon precedent and force than upon principle; and though the common sense of mankind revolted against this system, and even exhibited itself in revolutions and rebellions, they claimed the right to bind their subjects in all cases whatever. In the Declaration of Independence, the American idea is put forth directly opposite to the European idea; and our ancestors intended to carry out that idea in the establishment of our political institutions. They made no declaration of a principle that was applicable only to men of a particular class or color, but one that comprehended men of all ranks and conditions. It referred to man as a human being endowed with moral responsibility, and that free agency which is the foundation of that responsibility.

In forming the articles of confederation, they expressly refused to insert the word “white” as a qualification for electors. In this connection I am called upon to examine a decision of the highest tribunal of the country, and the Opinion of the Court announced by a magistrate venerable for his age, for his intellect, and for his high judicial qualification, and who now, ap-

proaching the termination of a long life, must soon, in the course of nature, appear before that tribunal where we must all appear on a footing of equality before the judge of all men. That opinion has been set forth by the reporter of the court as containing propositions which are contrary to some which I feel obliged to support. I shall examine that decision with the high respect which I entertain for the venerable Chief Justice and the other members of the Court who concurred with him; but I shall examine it with the higher respect which I hold to be due to the truth of history and the Constitution of the country. That decision, as put forth with all the dicta in the opinions of the court, would lead, I am free to admit, to conclusions which might justify this court in reversing the decision of the court below, unless they deem the question now before the court to be one entirely of a police character. But the decision itself is one that has been so much commented upon; one that has exercised so great an influence over public opinion, that it is proper for this court, and it is due to the cause of justice, it is due to the country, that if this court shall find that the opinions which are announced there, are not justified by law or by the truth of history, and were not necessary to the decision of the cause, it is due, I say, to the highest judicial tribunal of this State, if they come to that conclusion, to announce that conclusion so far as it is necessary to the decision of this case, with the view of finally determining a question of such vital importance to the tranquillity of the country.

What was the question in the Dred Scott case, and what was necessary for its decision? The case was that of a slave who claimed to be a citizen of Missouri, and who asked his freedom on the ground that, while he was a slave in Missouri he had been taken into a free territory or free State, and brought back again into Missouri by his master. These were the exact facts of the case. Out of those facts the question arose before the Federal Courts. The court came to the conclusion that by the law of Missouri, as declared by its highest court of appeal, a slave taken into a free State and brought back again to Missouri, must still be considered and held as a slave. That view was contrary to the old law of Missouri, as frequently declared by its courts. It was new law, and for the first time promulgated in the Dred Scott case; and that decision was made by two judges announcing the change in the law, the Chief Justice dissenting.

The majority of the court, in expressing their opinion, adopted the ground that in consequence of "the fell spirit of abolitionism prevailing in other States," they would no longer adhere to the law as formerly expounded in the Missouri Courts, but would adopt a new construction, from that time henceforth, and decided that where a slave is brought back from free territory where he had been carried by his owner into Missouri, he shall be considered still as a slave, notwithstanding their former decisions in favor of the opposite principle. Thus assuming the office of making instead of expounding the law. The Supreme Court of the United States had generally in its construction of local law, conformed to the rule that where a State Court had declared the local law it was the duty of the Supreme Court of the United States to give the same construction as was adopted in a series of decisions by the State Courts. In this case, however, although the decisions in Missouri previous to the Dred Scott case, had established the opposite principle, Chief Justice Taney, in delivering the Opinion of the United States Court, decided that the local law of Missouri was properly expounded in the decision in the Dred Scott case; and his associates, Justice Campbell, Nelson, Grier and Catron, all concurred in placing their judgment upon the law of Missouri as expounded by its highest court in the Dred Scott case.

Judge Nelson placed his opinion solely upon that ground and the judgment of the court, at the conclusion of Ch. J. Taney's opinion, is as follows: "It appears by the record before us, that the plaintiff in error is not a citizen of Missouri, in the sense in which the word is used in the Constitu-

tion, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment must, consequently, be reversed, and a mandate issued directing the suit to be dismissed; for want of jurisdiction."

When that conclusion was arrived at, the case was disposed of; all beyond that was *obiter dictum*. Every lawyer knows that. This Court is familiar with that principle; and in the Supreme Court of the United States, to whose decisions I will alone refer, it has been expressly so decided in two cases—one by Chief Justice Marshall, in *Ogden and Saunders*, who says: "it is a general rule, expressly recognized by the Court, that the positive authority of a decision is co-extensive only with the facts upon which it is made." And Mr. Justice Curtis, in *Carroll vs. Carroll*, 16 How, 287, delivering the unanimous opinion of the whole Court, consisting of all the judges upon the bench when the *Dred Scott* case was decided, said that, "to make an opinion on any subject a decision, there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties and decide to whom the property in contest belongs; and this Court has never held itself bound by any part of an opinion in any case, which was not necessary to the ascertainment of the right or title in question between the parties."

That is sound doctrine. It is law. It is the law of that court. It is the law of all courts, and is familiar to your honors. Now, under such circumstances, I might perhaps leave the examination of some of those opinions which bear on this case without further observation; but so much denunciation has been heaped upon those who have not surrendered their judgment to opinions expressed in that decision, upon questions not necessary to be decided, that I shall examine somewhat into the foundation of those opinions. Among some of the opinions not necessary for the decision of the case, it was stated that at the time when the Declaration of Independence was made, it was never intended by any of the leading men of the country, or by those who framed that Declaration, that the African race should be included as part of the people who framed and adopted it; and a great compliment is paid to the men who framed this Declaration of Independence, as men high in literary acquirements, and incapable of asserting principles inconsistent with those upon which they were acting; and that in the language used they never intended to comprehend the unhappy black race. Upon this historical statement, it is promulgated as the opinion of the court, that the colored race at that era were not citizens of the several States, and did not form part of the people of the United States. To determine upon the accuracy of this historical statement, reference must be made to the history of that period. I shall not comment upon the disingenuousness imputed to those distinguished men in using the words "all men," when they only meant "all white men," but will proceed to inquire what were the sentiments upon the point stated in the opinion of the court, entertained by the committee who framed that Declaration? The five members who formed the committee that reported the Declaration of Independence, were Jefferson, John Adams, Franklin, Robert R. Livingston, of this State, and Roger Sherman, the grandfather of my learned associate. Had they any such scruples or doubts upon this subject? Mr. Jefferson the chairman, brought forward a plan for the emancipation of slaves, when he was in the House of Delegates of his native State, and his opinions, constantly expressed during the Revolution, after the Revolution, and up to within six weeks before his death, are all well known; and I need hardly say, they were those of an uncompromising abolitionist of negro slavery.

John Adams was the author of the Constitution and Bill of Rights of Massachusetts, which were also in the main adopted by the State of New Hampshire; and it has always been held that the adoption of the Bill of Rights abolished slavery in these States, if indeed it ever existed there as a recognized legal institution.

Franklin, in one of the first petitions presented to Congress, upon its assembling under the Federal Constitution, signed by himself as president of the Pennsylvania Society for abolishing slavery, asked for the adoption of measures for promoting its abolition in the United States, and that "Congress would be pleased to countenance the restoration to liberty of those unhappy men, who alone in this land of liberty, are degraded into perpetual bondage."

Mr. Sherman, when the question was brought up in the Convention framing the Constitution to impose an impost duty on slaves, objected, on the ground that "such a tax would imply that slaves were property."

Mr. Livingston, in 1786, was a petitioner to the State Legislature for the abolition of slavery in New York; and as one of the Council of Revision in this State, he objected to a bill for the abolition of slavery because it made an unfavorable distinction between the negroes and white men, in denying votes to the negroes, and because "it holds up a doctrine which is repugnant to the principle on which the United States justified their separation from Great Britain."

Such were the opinions of the committee that reported that Declaration. The members of the Continental Congress and all the distinguished leaders of the Revolution held similar opinions. Among those who had occasion to express their opinions in favor of abolishing slavery in this country may be enumerated the names of Washington, Madison, Monroe, Patrick Henry, Pendleton, Wythe, Lee, Edmund and Peyton Randolph, George Mason, Judge Iredell, William Pinckney, Luther Martin, James Wilson, Hugh Williamson, Rutledge and Hooper and all the members of the first Continental Congress.

Fairfax County (Virginia) Meeting; GEORGE WASHINGTON, Esq., presiding; ROBERT HARRISON, gentleman, Clerk.

Resolved, That it is the opinion of this meeting, that, during our present difficulties and distress, no slaves ought to be imported into any of the British colonies on this continent; and we take this opportunity of declaring our most earnest wishes to see an entire stop forever put to such a wicked, cruel, and unnatural trade.—(Page 600.)

VIRGINIA CONVENTION.—At a very full meeting of delegates from the different counties in the colony and dominion of Virginia, begun in Williamsburg, the first day of August, in the year of our Lord 1774.

* * * * *

The abolition of domestic slavery is the greatest object of desire in those colonies where it was unhappily introduced in their infant state. But, previous to the enfranchisement of the slaves we have, it is necessary to exclude all further importations from Africa.

From Gen. Washington to Robert Morris.

17.

"MOUNT VERNON, 12th April, 1786.

"I can only say, that there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it. But there is only one proper and effectual mode by which it can be accomplished, and that is by legislative authority; and this, as far as my suffrage will go, shall never be wanting. . . . But your late purchase of an estate in the colony of Cayenne, with a view of emancipating the slaves on it, is a generous and noble proof of your humanity. Would to God a like spirit might diffuse itself generally into the minds of the people of this country."

From Mr. Madison's Report of Debates in the Federal Convention.

MR. MADISON.—We have seen the mere distinction of color, made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.—(Page 805.)

MR. MADISON.—And, in the third place, where slavery exists, the republican theory becomes still more fallacious.—(Page 899.) . . .

MR. L. MARTIN.—And, in the third place, it was inconsistent with the principles of the Revolution, and dishonorable to the American character, to have such a feature in the Constitution. . . .

MR. PINCKNEY.—If the States be all left at liberty on this subject, South Carolina may, perhaps, by degrees, do of herself what is wished, as Virginia and Maryland have already done. . . .

MR. SHERMAN.—He observed that the abolition of slavery seemed to be going on in the United States, and that the good sense of the several States would, probably, by degrees, complete it. . . .

COL. MASON.—Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the emigration of whites, who really enrich and strengthen a country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of Heaven on a country. . . .

MR. ELLSWORTH.—Slavery, in time, will not be a speck in our country. Provision is already made in Connecticut for abolishing it. And the abolition has already taken place in Massachusetts. . . .

MR. LANGDON was strenuous for giving the power to the General Government. He could not, with a good conscience, leave it with the States, who could then go on with the traffic, without being restrained by the opinions here given, that they will themselves cease to import slaves. . . .

MR. WILLIAMSON said, that both in opinion and practice he was against slavery; but thought it more in favor of humanity, from a view of all circumstances, to let in South Carolina and Georgia on those terms, than to exclude them from the Union. . . .

MR. MADISON thought it wrong to admit, in the Constitution, the idea that there could be property in men. The reason of duties did not hold, as slaves were not, like merchandise, consumed, etc.—(Page 1427 to 1430.) . .

Debates in Virginia State Convention, called to ratify the Constitution.

MR. GEORGE MASON.—As much as I value a union of all the States, I would not admit the southern States into the Union, unless they agree to the discontinuance of this disgraceful trade, because it would bring weakness and not strength to the Union. . . .

MR. MADISON.—At present, if any slave elopes to any of those States where slaves are free, he becomes emancipated by their laws; for the laws of the States are uncharitable to one another in this respect. . . .

North Carolina State Convention, called to ratify the Constitution.

MR. IREDELL.—When the entire abolition of slavery takes place, it will be an event which must be pleasing to every generous mind and every friend of human nature; but we often wish for things which are not attainable. It was the wish of a great majority of the Convention to put an end to the trade immediately, but the States of South Carolina and Georgia would not agree to it. . . .

MR. SPAIGHT.—South Carolina and Georgia wished to extend the term; the Eastern States insisted on the entire abolition of the trade. . . .

MR. GALLOWAY.—Mr. Chairman, the explanation given to this clause does not satisfy my mind. I wish to see this abominable trade put an end to. .

Debates in the Pennsylvania State Convention, called to ratify the Constitution.

MR. WILSON.—I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change which was pursued in Pennsylvania. . . .

Extract from Plan of a Constitution for Virginia—Drawn up by Mr. Jefferson, in 1783.

The General Assembly shall not have power to permit the introduction of any more slaves to reside in this State, or the continuance of slavery beyond the generation which shall be living on the thirty-first day of December, one thousand eight hundred; all persons born after that day being hereby declared free.—(Page 226.)

These men, the leaders of the Revolution in the Southern States, were clear and open in their condemnation of slavery, as not only inconsistent with our institutions, but as injurious to our interests. What name known to American history can be mentioned, expressing different sentiments. These opinions were in unison with the general opinion then prevailing through the country. Samuel Hopkins' church, in Newport, in 1770, resolved that slavery should not be tolerated in that church. The first Continental Congress resolved unanimously in October 20, 1774, to wholly discontinue the slave trade, and to sell nothing to those engaged in it, and to hold them as inimical to the liberties of the country. The North Carolina Provincial Convention, in August, 1774, resolved, "that no slaves shall be imported after the 1st of November next." The convention of Georgia, in January, 18, 1775, declared its disapprobation and abhorrence of the unnatural practice of slavery in America, and resolved "to use their utmost endeavors for the manumission of our slaves in this colony; and the convention in Maryland, in November, 1774, also declared in favor of the abolition of the slave trade. The Virginia Convention, in August, 1774, unanimously resolved to prohibit the slave trade after the 1st of November next, and declared that "the abolition of domestic slavery is the greatest object of desire in those colonies, where it was unhappily introduced in their infant State. These publicly avowed opinions of leading men and State Conventions are decisive as to the opinions of the country on that subject at the time of the Revolution. In addition to this evidence of public sentiment, the Constitutions of the States of Massachusetts, New York, New Jersey, Virginia, Maryland, North Carolina and New Hampshire, framed pursuant to the recommendation of Congress, made at the time of preparing the Declaration of Independence, and sanctioned as part of the plan for the future good of the country, adopted provisions in which no distinction between white and colored inhabitants is recognized in the qualification of voters. And in Maryland, negroes actually voted till 1801, and in Virginia, until 1850. Pennsylvania and Georgia, who framed their constitutions much later, made no distinction of that character; and in Rhode Island and Connecticut, States that determined to continue under the government of their own colonial charters, no such distinction is to be found. The only two remaining States are Delaware and South Carolina. Delaware had no State constitution until June, 1792, and in that constitution the phrase "white citizen is inserted among the qualifications for voters. South Carolina formed its constitution in 1776, referring to its laws for the qualifications of voters. In 1778 and in 1790, she remodelled her constitution, and here the word "white" citizen is inserted as a qualification of electors. When the articles of confederation were framed, the privileges and immunities of citizens of the several States were guaranteed to the *free inhabitants* of each of the States. -- After these articles had been submitted to the States, South Carolina, June 22, 1778, moved to insert the word "white" after free, so as to read free white inhabitants, but the amendment was rejected, South Carolina and Georgia only voting for it.

It therefore appears that 11 out of the original 13 States recognized no distinction between free blacks and free whites, even as voters, and that the two States where such a distinction was recognized, did not frame their constitutions until after the adoption of the Federal Constitution, and that their right as voters and not as citizens, alone is affected by their provisions.

Now, under such circumstances, to put forth as authoritative history that the distinction between free black citizens and free white citizens, was recognized and acted upon in the period of the Revolution, is a proposition not sustained by a careful examination of the history of the country; and any judicial opinion founded upon it, is not only without authority, as not being necessary for the decision of the case, but as being entirely unsupported by the history to which it refers.

The conclusion is therefore clear that at the era of the Revolution free negroes were deemed citizens; and that proposition is sustained by cases in 8 Dev. & Bat. 20; 5 Iredell, 253; 18 Pick. 210.

Another proposition not necessary to the decision of the Dred Scott case, was advanced by one of the justices, i. e., that property in slaves was the only private property specifically recognized in the Federal Constitution, and that it is the duty of the government to protect and enforce it, and in the report of the case it is stated that any citizen has a right to take into the public territory property thus recognized. I can find no such recognition in the Constitution. Great pains were taken in framing that instrument, to avoid such recognition. The word "slave" or slavery is not to be found there. Even the words "lawful or legal servitude" were deemed too strong for the convention, and in what is designated the fugitive slave clause, the words are, "no person held to service or labor in one State under the laws thereof escaping into another, shall in consequence of any law therein be discharged from such service or labor."

A provision equally applicable to apprentices and redemptioners as to slaves. There is no recognition of the right of property in men, and in the case of *Groves vs. Slaughter*, 15 Peters, 507, Justice McLean says "the character of property is given them by the local law." "The Constitution acts upon slaves as *persons* and not as *property*." The only object of that provision was to exempt fugitive slaves from the operation of the universal rule that a slave can be held only by virtue of the local law, and it must be confined to that. In the Federal Constitution, when the various provisions in relation to taxation and representation came up, the question as to how far slaves were to be deemed property, of course was discussed and agitated. Mr. Sherman and Mr. Madison declared it would be wrong to admit in the Constitution, "that men could hold property in men;" and the language in relation to levying a tax on the importation of slaves was changed, so that it should read "not more than a tax of \$10 on each person," and the motion to designate the trade allowed as "the importation of negroes," was rejected, Ayes, 3; Nays, 6.

Mr. Randolph of Virginia, and Mr. Gouverneur Morris of New York, entertained and expressed similar views. It was on motion of Mr. Edmond Randolph, when the fugitive slave provision was under discussion, that the word "servitude" was stricken out, and the word "service" inserted; the former word being deemed applicable to slaves, and the latter to free persons; and when that provision was under discussion, the word "legally" before "held to service," was stricken out, as it was objected that slavery could not be legal in a moral point of view, and it was amended by inserting the words "under the laws thereof."

Convention Journal, 306, 365, 384.

With these facts patent on the face of our country's history, I am warranted in advancing as a proposition one directly contrary to that of our learned opponent, namely: that at the establishment of our government, and at the adoption of the Federal Constitution, it was well understood that negro slavery was held to be wrong in principle and practice, that it was deemed to be inconsistent with the foundation and principles of our institutions; but inasmuch as the evil existed in different degrees, in different States, that the plan of a gradual extinction of domestic slavery which it was conceded must take place should become the care and duty of the State

Governments where it existed ; and that they might each determine on the time, the mode and means of extirpating the evil.

If any further proof is wanted of that proposition, it is to be found in the debate on Doctor Franklin's petition for the abolition of slavery in the United States, before the First Congress held under the Federal Constitution. Mr. Parker, of Virginia, said that he deemed it his duty as a citizen of the Union, to espouse the cause of the petitioners. Mr. Paige, of Virginia, was also in favor of it. Mr. Scott, of Pennsylvania, declared that he could not conceive how any person could be said to acquire property in another. The representatives from South Carolina and Georgia were opposed to this general emancipation ; but they all admitted it to be the wish of the country.

Mr. Jackson, of Georgia, said, "It was the fashion of the day to favor the liberty of the slaves."

It was in fact an implied understanding and agreement. In carrying out that general understanding, the various States in the North took up the subject with great vigor, and enacted laws for the gradual emancipation of slaves within their respective jurisdictions, in the following order: Vermont in 1777; Pennsylvania in 1780; New Hampshire in 1783; Rhode Island and Connecticut in 1784; New York in 1799; and New Jersey in 1804.

In Massachusetts, by a judicial decision in the case of *James vs. Lechmere*, in 1770, it was declared that slavery had no legal existence in the State.¹⁸⁵

Thus eight States faithfully carried out the contemplated plan of gradual emancipation, and seven of these were of the original thirteen; and in so doing they rendered the principle of the Declaration of Independence a living letter, instead of a "glittering generality."

At that period abolition of negro slavery was the wish and determination of the country, and the leading patriots of Virginia, New York and Pennsylvania—Washington, Jefferson, Patrick Henry, Madison, Mason, Randolph, Gouverneur Morris, R. R. Livingston, John Jay, Franklin and Wilson all cooperated with those of New England in giving effect to that understanding, within their respective spheres of influence. No such conclusion, therefore, as the appellants maintain in this case can be derived from any facts set forth in the history of the country. Indeed, directly the opposite conclusion is the proper one to be drawn from its perusal. Such was the opinion of the world; such were the decisions of Courts and the principles of general jurisprudence at the era of our Revolution. They conform to the jurisprudence of Europe and adopt the same conclusions as to slavery being local in its character and contrary to elementary law.

I now proceed to inquire whether there are any features in American Slavery that should recommend it to special favor, in a court of justice. Its general principles are that the master owns the body of the slave, his family and children; that he can sell him, either with or without his wife or his children; that he can marry the man or the woman to another wife or another husband, separating families at his pleasure; and this is also done by the law, in the division of estates, without the consent of the master; that the master is entitled to all the products of his slave's labor; that he gives him such measure of food, and such clothing as, in the master's judgment, shall be deemed sufficient; that he coerces that slave to labor, by punishment, the degree of which, short of taking life, depends on the discretion of the master; and that all these high powers can be exercised by an agent or a lessee, with the same legal authority as the master himself has. As to the measure of punishment and the kind of punishment, the reports of cases in the courts of the slave States of which judicial notice can be taken, all show that that punishment is commonly administered after the day's labor is ended, by whipping the slave when tied to the whipping-post. In some places legal provision is made for a public whipping-post and an officer to administer the punishment.

Should such a mode of punishing any domestic animals be perpetrated in

a free State, one week would not elapse before the owner would be made amenable to the criminal law. Such a system, I may safely say, does not recommend itself with any peculiar degree of favor to the consideration of any court administering the laws of enlightened jurisprudence, and no exception can be fairly made which shall exempt it from their application.

I find an objection on the points of our opponents, in which the color of the African slave is made a justification for his enslavement. It is very easy, when a class is sought to be made the object of oppression and tyranny, to fix upon some pretence, under color of which that oppression can be exercised. In former times, when slavery was more general, a difference in religion, or the want of religion—the fact that a race was heathen, or infidel, or heretic, was deemed a good reason for reducing it to slavery. It making very little difference in the condition of one destined to ever enduring punishment, that his limited earthly existence should afford him some foretaste of what he is hereafter to endure.

Oliver Cromwell, a sagacious and far-seeing statesman, thought he saw in the difference of religion between the Irish and the Puritans, and in the hopeless and unimproving condition of that unfortunate island, a full justification for reducing a large portion of its population to slavery, and supplying their place with God-fearing Presbyterians. That experiment was carried out to some extent in the north of Ireland, and a large number of Irish Catholics were shipped as slaves to Barbadoes. But it may well be doubted whether such proceedings even against heretics or infidels can be justified by any sound rule of morals or ethics. As little can it be justified in respect to those of a different color. Montesquien may, perhaps, be deemed the original suggestor of this peculiar justification of negro slavery. I will read to the Court from his *Spirit of Laws* a few of his suggestions on that point: which are probably as sound as those on the appellant's points. That distinguished author says:

"If I should be obliged to sustain the right of making negro slaves, this is what I should say: The Europeans, having exterminated the Americans, are obliged to enslave the Africans to cultivate so much land. Sugar would be too dear if we should be obliged to cultivate the plant except by slave labor. They are altogether black, and they have noses so flattened that it is almost impossible to pity them. One dare not impute to the Deity, who is a being all-wise, that he has put a soul—especially a good soul—in so black a body. A proof that the negroes have not common sense is that they prize more a collar of glass than one of gold, which among nations polished, is of so great importance! It is impossible that we should suppose these people are men; because, if we grant that they are men, we shall begin to believe that we ourselves are not Christians. Weak minds exaggerate too much the injustice done to Africans; for if it was so great as they say, how does it happen that European governments, who make so many useless conventions, have made no convention in favor of mercy and justice."

Some persons have indeed supposed that Montesquien was here indulging in a spirit of sarcasm; but as it has been gravely cited by a profound judge as a serious defence of negro slavery, I must presume that I am mistaken in attributing a spirit of lightness to so grave a jurist.

I shall not detain the court any further on the point that, because these persons have a different color, any different rule of ethics or law is applicable to them; but shall proceed to the consideration of some other topics pertinent to the case. In the United States we have a government of divided powers. The people have delegated certain powers to the Federal Government, under the Constitution, and have reserved to the State governments what has not been conferred, either expressly or by implication, upon the Federal Government, and what is not prohibited in the State Constitutions to the State governments. The legislature has, in the exercise of its sovereign authority, prohibited any slave from being brought within this State.

The persons here claimed as slaves, are free by the express enactment of the legislature of this State.

1 *R. S.*, Part 1, Tit. 656, 7, § 1.

"No person held as a slave shall be imported, introduced, or brought into this State, on any pretence whatever. Every such person shall be free."

"Every person brought into this State as a slave shall be free."

The exception originally made in favor of persons in transitu with their slaves, was repealed in 1841.—Ch. 247.

The State has prohibited, so far as it can prohibit by law, the slave trade from being carried on in any manner through its territory. Is that law beyond its constitutional power?

There is no prohibition in the State Constitution against the passing of such a law.

Is there any in the Federal Constitution? It is said that the power to regulate commerce between the States is exclusively vested in Congress; but in *Groves vs. Slaughter*, the Supreme Court of the United States decided that the migration of slaves between the States did not fall within that power; that Congress could not prohibit or regulate that trade, or migration, under the commercial regulating power. Is there, then, no power, under our government, to regulate or prohibit that trade? It is not in Congress. Can it then be anywhere than in the States?

But more: the State Government has exercised this power, without question, in many other instances. Many of the slave States have passed laws prohibiting the importation of slaves within their respective territories. Virginia, Maryland, Louisiana and Mississippi have passed laws of this character. Is it competent for the legislature of a slave State to pass such laws, and not competent for the legislature of a free State to do the same? It is justified in the slave States on the ground that it is a police power; and without doubt, that justification rests on a sound foundation. But if the power is recognized to exist in a State Government, the motives for its exercise belong solely to the judgment of the State Legislature.

No Court can declare a law to be unconstitutional because it may deem the motive which induced its passage not sufficiently strong for that end. The legislature in whom the power is vested is the sole judge of the propriety of its exercise. The Slave States deemed the exercise of such an authority to be most important for the preservation of their tranquillity; and it cannot be conceded to them, unless the same concession is made to the Free States. In this connection I may also remark that the right to declare and control the condition of its citizens, is a right belonging to the States, and has not been conferred on the Federal Government; otherwise, the whole power over Slavery must be deemed within the control of Congress.

I now turn to the claim that under this Government, we are bound to recognize the claim of the master while travelling in this State, either by force of the Federal Constitution, or under a rule of comity. We contend that those persons claimed as slaves cannot be held here by virtue of any provision of the Constitution of the United States.

The provisions cited on the argument before Mr. Justice Paine are:

That relating to fugitives from justice. Art. 4, § 2.

That full faith and credit shall be given in each State to the public acts of every other State. Article 4, § 1.

That the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 4, § 2.

That no citizen shall be deprived of life, liberty, or property, without due process of law. Article 5 of Amendments.

None of these provisions have any reference to this case.

They are not fugitives escaping into this State from another State.

We give full faith and credit to the act of Virginia, that made these persons slaves there.

We allow the appellant all the privileges and immunities of a citizen of this State.

He has not been deprived of property by these proceedings.

The appellant *had no property* in these persons. It ceased to be property when he brought them into the State of New York.

The Constitution of the United States is a grant of powers to the General Government. It follows, by necessary consequence, that what is not granted is reserved.

If there is no grant of power to enforce upon New York the obligation to allow a citizen of a Slave State to bring his slaves here and retain them here as slaves, while sojourning or passing through this State, the General Government has not the power; and the right to do so does not exist.

New York having prohibited the act, no jurisdiction can declare her law unconstitutional.

She has the right to reiterate the law of nature—to purge her soil of an evil that exists only in violation of natural right—to maintain, in practice as well as theory, the sacred rights of persons and personal liberty.

Even in consenting to the reclamation of fugitives from service, she does not acknowledge the law of slavery.

She agrees to ignore that question, and not to inquire into the nature of the duty of service, on the part of the fugitive, whether a slave or an apprentice, but to remit him to the Courts of the State from which he fled.

But this is the extent of her duty. Her bond extends no further than to the *fugitive*.

As to all other persons, her laws protect their personal liberty against all claimants.

The Federal Constitution does not impose any implied obligation on the part of New York, to allow a slave within her borders, in any form or under any circumstances.

The provision relating to the surrender of fugitives from service, is the only possible case where such an obligation can arise. And by incorporating this provision in the Constitution, every other case is excluded. — *Expressio unius, exclusio alterius*.

If the general right existed, and it was admitted that a slave of a Slave State might still be held if escaping into or taken into a free State *in transitu*, the constitutional provision as to fugitives would be superfluous.

The comity of States does not require us to admit slavery into our State in any form. Our policy is that of freedom, their policy the reverse. Comity is on the principle of reciprocity, and whether it should be exercised or not, is a question for the government or State to determine, and not the court.

In *Augusta vs. Earle*, 13 Pet. 589, Ch. J. Taney says, “that in extending comity toward the laws of other States, it is the State and not the Court that establishes the rule. There can be no comity by judicial construction here, because the State has an express statute, declaring these persons to be free. It has taken from the Court all power to declare a rule of comity by an express law declaring that such a rule shall not be observed. But comity is not an obligation to be enforced. It is a courtesy, allowed by the party extending it; and in deciding whether comity requires us to do this, we look to our own laws for authority. (Story, *Conflict of Laws*, §§ 23, 24, 36, 37.) It cannot be exercised in violation of our own laws. An act cannot be allowed to be done by a citizen of another State, which would be deemed a felony if done by one of our own citizens. These principles have never been questioned, and these laws have always been submitted to, from the foundation of our government, until Mr. Calhoun adopted and promulgated the idea of a balance of power between the Slave States and the Free States in the Federal Government, and thus gave life and vigor to this sectional

strife. No one ever doubted until that time, that these laws were constitutional, and without question. He, however, finding that the Free States were outnumbering the Slave States in wealth and population, advanced the idea that it was necessary to maintain a balance of power between the Free and Slave States in the Federal Government; and that the Slave States should be compensated by an increase of slave representation in the Senate for the increase of free representation in the House. This has produced the state of feeling which we find now existing in the country.

This controversy has produced in our public councils a bitterness of feeling that can find no place here. Here we are to look for the application of principles derived from the Constitution and the history of the country. The propositions laid down on the respondent's points, if sanctioned by this Court, will go to restore those views of the Constitution that have been disturbed and shaken by this controversy. In that way, and that way only, can harmony be restored to the public mind, by going back to the principles promulgated by those who framed our institutions, the spirit of mutual concession and forbearance that then existed, and, above all, a determination on the part of the whole country that all institutions which are inconsistent with the principles that lie at the foundation of our government, shall give way in due time and in a proper manner, to the force of Christianity and civilization. No harmony can be produced by an acquiescence in a system that contemplates the lasting bondage of any one part of the community. Such a system is inconsistent with that eternal rule of right which must and will vindicate itself; and if a system founded upon such monstrous injustice is sought to be maintained as a permanent institution, nothing can follow from it but dissension and confusion. Human will and human laws must yield in such a conflict. In the universal language of all the races of man in all ages, God is above all. His laws must prevail, and history teaches that their tendency, however slowly, still irresistibly operates to bring about the establishment of human freedom. By recognizing in each State the power to declare and regulate the condition of its own population; the right of controlling them by State legislation and State policy; and giving to the Federal Government the power of controlling the foreign relations and the domestic powers designated in the Constitution, the relative harmony of the two governments will be maintained, and the tranquillity of the country will be best preserved.

New York, whilst it claims the right on its own part of regulating and controlling its own policy, repudiates all right or authority to interfere with the policy or social condition of any other State. She is faithful to her own obligations to the Federal Constitution, and she means to maintain her own rights under that Constitution.

These slaves were brought voluntarily by their mistress into this State. She thus subjected them to the operation of our laws; and this has always been decided by the Courts, in the slave as well as in the free States, as an acquiescence on the part of the owner in the operation of those laws, and a consent to the emancipation of the slave.

But it is said that the States are inhibited from passing these laws, and that the whole subject is committed to Congress, under the commercial regulating power. This is not so. When the case of *Ogden vs. Gibbons* was decided, the opinion of the Court was that the commercial regulating power was exclusive; but afterward, in the case of *New York vs. Miln* (a case which, with the late Mr. Ogden, I had the honor to argue before the Supreme Court), the Court adopted the principle that the passenger laws, which are similar to these, might be passed under the police power. In the case of *Groves vs. Slaughter*, the court held that the power of regulating the migration of slaves between the States was not in Congress. It is obvious that such a power must exist somewhere. A trade like this must necessarily be subjected, whenever necessary, to legal regulation; and if Congress has not the authority, the State government must have it.

Then, I say, these persons cannot be restrained of their liberty here, whatever may have been their condition in Virginia. If restrained of liberty here, it must be either under, and by virtue of our laws, or under the laws of Virginia. The allegation of the suit is, that they were held and confined in a certain house in the city of New York against their will. The answer is, they were slaves. Our laws prohibit any such holding. They furnish no remedy if the persons claimed refuse to be detained. The question here is, can they be detained? Certainly not by our laws; and our Courts can only administer our own laws. The laws of Virginia are not in force here. If the slave resists, how can he be compelled to subjection? If the master has not the power to enforce obedience, he cannot invoke the aid of law, for no law exists for such a case. It follows that our laws in this respect, if they remain neutral, leave the parties to their natural rights. This being so, the slave is free. Our authorities can only execute the laws of this State, and not those of another State.

Again, I say these persons are free by the common law. The English common law, as adjudicated before and since our Revolution, as expounded by the Courts of Maryland, Virginia, South Carolina, Louisiana, Missouri and Kentucky, adjudges them to be free. By the principles of the law of nations and of universal jurisprudence maintained by the philosophers and jurists of various countries, in all ages, and recognized by all Christendom, they are free. The Constitution of the United States does not, by any express terms, require the Court to deliver them to slavery. No implication can be drawn from any provision of that instrument to remand them to slavery. The laws of this State expressly declare them free. In conclusion, we urge in their behalf the common jurisprudence of all nations—the principles of the common law—the doctrines of the founders of our government—the legislation of our own State—the public opinion of the world, and we deny, on the part of the people of the State of New York, that these persons, claimed as slaves, can be deemed as such in our Courts of justice.

I have given to the Court the result of my examination into the history of the Revolution; the formation of the Articles of Confederation, and of the Federal Constitution; the debates in the State conventions that adopted the same; the early proceedings of Congress, and the acts of gradual emancipation in a majority of the States. They lead irresistibly to the conclusion that it was then contemplated that Slavery, as a system, was inconsistent with our political institutions; the difficulties of getting rid of the evil were all foreseen; but it was conceded that it must, to relieve us from the charge of inconsistency, be ultimately abolished; and that in consequence of the different degrees of slavery existing in various States, the strong state necessity presented by the condition of the country, the time and manner of its extinction should be intrusted to the several State governments. It appears that more than half of these State Governments have faithfully and scrupulously carried out that engagement, to the very spirit and letter; and that the others have failed so to do. But we contemplate taking no action in consequence of that failure. New York, faithful herself in the performance of all her federal obligations, express and implied, prefers to trust to a spirit of justice that yet may be revived on the part of those who have not carried out their obligations under the Constitution in the same manner she has done. She repudiates all attempts to interfere with the policy of other States; and will brook no interference with her own. If the executive of any State of this Union should find himself compelled, from civil dissension or servile commotions, to ask the interposition of the Federal Government, New York will cheerfully furnish her quota of the force necessary to restore tranquillity. Of fugitive slaves, when properly demanded, she makes no pretensions to avoid the restoration. She seeks no interference with, or evasion of that public duty. If perchance, instead of a fugitive slave, it should be a fugitive system of human servitude, that should demand the care and attention of the Federal Govern-

ment, that would present another question, which it might be the duty of that government to take care of and to control. But it is to be hoped that such a day is far distant, and that this Court, guided by the suggestions that have been made, and enforcing them with more power of argument than I possess, may put forth a decision in relation to the principles involved in this case that shall establish the law—that law, to borrow the language of Hooker, whose seat is in the bosom of the Constitution, and whose voice is the harmony of the Union.

ARGUMENT OF MR. EVARTS FOR THE RESPONDENTS.

MR. EVARTS, upon addressing the Court, submitted the following Points, saying that they were intended to be taken in connection with those of his learned associate (Mr. Blunt), and that he had not thought it necessary to repeat the citations to be found on Mr. Blunt's points, and on which they both relied.

POINTS.

FIRST POINT.—The writ of Habeas Corpus belongs of right to every person restrained of liberty within this State, under any pretence whatsoever, unless by certain judicial process of Federal or State authority.

2 Rev. Stat. p. 563, § 21.

This right is absolute, (1) against legislative invasion, and (2) against judicial discretion.

Cons. Art. I. § 4.

2 Rev. Stat. p. 565, § 31.

In behalf of a human being, restrained of liberty within this State, the writ, *by a legal necessity*, must issue.

The office of the writ is to enlarge the person in whose behalf it issues, unless *legal cause* be shown for the restraint of liberty or its continuation; and enlargement of liberty, unless such cause to the contrary be shown, flows from the writ by the same legal necessity that required the writ to be issued.

1 Rev. Stat. 567, § 39.

SECOND POINT.—The whole question of the case, then, is, does the relation of slaveowner and slave, which subsisted in Virginia between Mrs. Lemmon and these persons while there, attend upon them while commorant within this State, in the course of travel from Virginia to Texas, so as to furnish "legal cause" for the restraint of liberty complained of, and so as to compel the authority and power of this State to sanction and maintain such restraint of liberty.

1. Legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this State.

Nothing has, or can claim, the authority of law within this State, unless it proceeds—

(A.) From the sovereignty of the State, and is found in the Constitution or Statutes of the State, or in its unwritten common (or customary) law; or—

(B.) From the Federal Government, whose Constitution and Statutes have the force of law within this State.

So far as the Law of Nations has force within this State, and so far as, "by comity," the laws of other sovereignties have force within this State, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this State.

Story Conf. Laws, § 18, 20, 23, 25, 29, 33, 35, 37, 38.

Bank of Augusta *vs.* Earle, 13 Pet. 519, 589.

Dalrymple *vs.* Dalrymple, 2 Hagg. Consist. Rep. 59.

Dred Scott *vs.* Sandford, 19 How. 460-1, 486-7.

II. The Constitution of the United States and the Federal Statutes give no law on the subject.

The Federal Constitution and legislation under it have, in principle and theory, no concern with the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several States.

The actual exceptions are special and limited, and prove the rule.

They are—

1. A reference to the civil conditions obtaining within the States, to furnish an artificial enumeration of persons as the basis of Federal Representation and direct taxation, distributively between the States.

2. A reference to the political rights of suffrage within the States as, respectively, supplying the basis of the Federal suffrage therein.

3. A provision securing to the citizens of every State within every other the privileges and immunities, (whatever they may be,) accorded in each to its own citizens.

4. A provision preventing the laws or regulations of any State governing the civil condition of persons within it, from operating upon the condition of persons "held to service or labor in one State, under the laws thereof, escaping into another."

None of these provisions, in terms or by any intendment, support the right of the slaveowner in his own State or in any other State, except the last. This, by its terms, is limited to its special case, and necessarily excludes Federal intervention in every other.

Const. U. S. Art. I. sec. 2, subd. 1 and 3.

Art. IV. sec. 2, subd. 1 and 3.

Laws of Slave States, and of Free States, on Slavery.

Ex parte Simmons, 4 W. C. C. R. 396.

Jones *vs.* Van Zandt, 2 McLean, 597.

Groves *vs.* Slaughter, 15 Peters, 506, 508-510.

Prigg *vs.* Penn., 16 Peters, 611-12, 622-3-5.

Strader *vs.* Graham, 10 How. 82, 93.

New York *vs.* Miln, 11 Peters, 136.

Dred Scott *vs.* Sandford, 19 How. 393.

Ch. J. 452.

Nelson, J. 459, 461.

Campbell, J. 508-9, 516-17.

The clauses of the Constitution of the United States touching the commercial power of the Federal Government have no effect, directly or indirectly, upon the question under consideration.

Cons. U. S. Art. I. sec. 8, subd. 3.

" " sec. 9, subd. 1, 5.

The Passenger cases, 7 How. 283.

Groves *vs.* Slaughter, *ut supra*.

New York *vs.* Miln, *ut supra*.

III. The common law of this State permits the existence of slavery in no case within its limits.

Cons. Art. I. § 17.

Sommersett's Case, 20 How. St. Trials, 79.

Knight *vs.* Wedderburn, Id. § 2.

Forbes *vs.* Cochrane, 2 B. & C. 448.

Shanley *vs.* Harvey, 2 Eden, 126.

The Slave Grace, 2 Hagg. Adm. 118, 104.

Story Conf. Laws, § 96.

Co. Litt. 124 b.

IV. The statute law of this State effects a universal proscription and prohibition of the condition of slavery within the limits of the State.

1 R. St. p. 656, § 1.—No person held as a slave shall be imported.

introduced or brought into this State, on any pretence whatever, except in the cases herein after specified. Every such person shall be free. Every person held as a slave, who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free.

§ 16. Every person born within this State, whether white or colored, is free; every person who shall hereafter be born within the State, shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free.

2 R. St. p. 664, § 28.

Laws 1857, p. 797.

Dred Scott *vs.* Sandford, 19 How. 591-595.

THIRD POINT.—It remains only to be considered whether, under the principles of the Law of Nations, as governing the intercourse of friendly States, and as adopted and incorporated into the administration of our municipal law, *comity* requires the recognition and support of the relation of slave-owner and slave between strangers passing through our territory, notwithstanding the absolute policy and comprehensive legislation which prohibit that relation and render the civil relation of slavery *impossible* in our own society.

The *comity*, it is to be observed, under inquiry, is (1) of the State and not of the Court, which latter has no authority to exercise comity in behalf of the State, but only a judicial power of determining whether the main policy and actual legislation of the State exhibit the comity inquired of; and (2) whether the comity extends to yielding the affirmative aid of the State to maintain the mastery of the slave-owner and the subjection of the slave.

Story Conf. Laws, § 38.

Bk. Augusta *vs.* Earle, 13 Pet. 539.

Dred Scott *vs.* Sandford, 19 How. 591.

I. The principles, policy, sentiments, public reason and conscience, and authoritative will of the State sovereignty, as such, have been expressed in the most authentic form, and with the most distinct meaning, that slavery, whencesoever it comes, and by whatsoever casual access, or for whatsoever transient stay, SHALL NOT BE TOLERATED UPON OUR SOIL.

That the particular case of slavery during transit has not escaped the intent or effect of the legislation on the subject, appears in the express permission once accorded to it, and the subsequent abrogation of such permission.

1 Rev. St. Part I. ch. XX. Tit. 7, § 6, 7.

Repealing Act, Laws 1841, ch. 247.

Upon such a declaration of the principles and sentiments of the State, through its Legislature, there is no opportunity or scope for judicial doubt or determination.

Story Conf. Laws, §§ 36, 37, 23, 24.

Vattel, p. 1, §§ 1, 2.

II. But, were such manifest enactment of the sovereign will in the premises wanting, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when the domestic laws reject and suppress such *status* as a civil condition or social relation.

(A.) The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population, forbid them in the case of strangers within our territory.

(B.) The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists, it is an ever new and active violation of the law of nature.

Of this no more explicit or unequivocal statement can be framed than

is to be found in the Constitution of the State of Virginia. Thus, the first article of the Bill of Rights of that Constitution declares :

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

It originates in mere predominance of physical force, and is continued by mere predominance of social force or municipal law.

Whenever and wherever the physical force in the one stage, or the social force or municipal law in the other stage, fails, the *status* falls, for it has nothing to rest upon.

To continue and defend the *status*, then, within our territory, the stranger must appeal to *some* municipal law. He has brought with him no system of municipal law to be a weapon and a shield to this *status*; he finds no such system here. His appeal to force against nature, to law against justice, is vain, and his captive is free.

(C.) The Law of Nations, built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.

(D.) A State proscribing the *status* of slavery in its domestic system, has no apparatus, either of law or of force, to maintain the relation between strangers.

It has no code of the slave-owner's rights or of the slave's submission, no processes for the enforcement of either, no rules of evidence or adjudication in the premises, no guard-houses, prisons or whipping-posts to uphold the slave-owner's power and crush the slave's resistance.

But a comity which should recognize a *status* that can subsist only by force, and yet refuse the force to sustain it, is illusory. If we recognize the fragment of slavery imported by the stranger, we must adopt the fabric of which it is a fragment and from which it derives its vitality.

If the slave be elojgned by fraud or force, the owner must have replevin for him or trover for his value.

If a creditor obtain a foreign attachment against the slaveowner, the sheriff must seize and sell the slaves.

If the owner die, the surrogate must administer the slave as assets.

If the slave give birth to offspring, we have a native-born slave.

If the owner, enforcing obedience to his caprices, maim or slay his slave, we must admit the *status* as a plea in bar to the public justice.

If the slave be tried for crime, upon his owner's complaint, the testimony of his fellow-slaves must be excluded.

If the slave be imprisoned or executed for crime, the value taken by the State must be made good to the owner, as for "private property taken for public use."

Everything or nothing, is the demand from our *comity*; everything or nothing, must be our answer.

(E.) The rule of the Law of Nations which permits the transit of strangers and their property through a friendly State does not require our laws to uphold the relation of slave-owner and slave between strangers.

By the Law of Nations, men are not the subject of property.

By the Law of Nations, the municipal law which makes men the subject of property, is limited with the power to enforce itself, that is by its territorial jurisdiction.

By the Law of Nations, then, the strangers stand upon our soil in their natural relations as men, their artificial relation being absolutely terminated.

The Antelope, 10 Wheat., 120, 121, and cases *ut supra*.

(F) The principle of the law of nations which attributes to the law of

the domicil the power to fix the civil *status* of persons, does not require our laws to uphold, *within our own territory*, the relation of slave-owner and slave between strangers.

This principle only requires us (1) to recognize the consequences in reference to subjects within our own jurisdiction, (so far as may be done without prejudice to domestic interests), of the *status* existing abroad; and (2) where the *status* itself is brought within our limits and is here permissible as a domestic *status*, to recognize the foreign law as an authentic origin and support of the actual *status*.

It is thus that *marriage* contracted in a foreign domicil, according to the municipal law there, will be maintained as a continuing marriage here, with such traits as belong to that relation here; yet, incestuous marriage or polygamy, lawful in the foreign domicil, cannot be held as a lawful continuing relation here.

Story Conf. Laws, §§ 51, 51, a., 89, 113, 114, 96, 104, 620, 624.

(G.) This free and sovereign State, in determining to which of two external laws it will by *comity* add the vigor of its adoption and administration within its territory, viz., a foreign municipal law of force against, right, or the law of nations, conformed to its own domestic policy, under the same impulse which has purged its own system of the odious and violent injustice of slavery, will prefer the Law of Nations to the law of Virginia, and set the slave free.

Impius et crudelis judicandus est, qui libertati non favet. Nostra jura in OMNI CASU libertati dant favorem.

Co. Litt. ut supra.

MR. EVARTS then proceeded with the argument, and said:

If the Court please: The question brought originally under judicial examination and for practical determination, was an interesting and important one, as it respected the liberty of the persons whose fate was to be determined, under our law, by our jurisprudence, and by the judgment of our courts. Their number was considerable; and ever in enlightened communities, there is no question so important as that which touches the liberty of man—in a free country, important that the full measure of that liberty, shall not be unjustly and unlawfully circumscribed, and in a despotic country, or in a country where slavery exists, important that the poor remnant of that liberty may not be still more abridged. Therefore, that imprisonment should continue an hour longer than it ought by law, or that there should be constraint of limb or voice that the law does not allow, is ever a consideration that should call off courts of justice from the ordinary deliberations on matters of property, however great, until this question be determined, and this great wrong, if it be one, be redressed. But when the question of liberty is presented in the persons not only of so many, and not only for their lives, but for the whole stream of their posterity forever, I apprehend that no court of justice (though limiting the gravity of this question to that of the fate of these eight persons and their posterity), ever had occasion to consider a graver question of human liberty, or ever to be more careful that they should not, by an erring judgment, determine the doom of these people forever. The question is here, and it is not to be evaded. Whatever is done concerning the future of these persons, is done by the law of New York, imposed by her own State authority, or by the law of New York, resting upon and imposed by, the paramount authority of the Federal Government. Whatever of doubt or difficulty there may be, whatever of obscurity or uncertainty there may be, on this question, the determination of this court, as that of last resort in this State, finally impresses the right, the sanction, the force, that are necessary, and thus establishes, continues, or permits the slavery of these men and women.

Now, beyond controversy, as it is the duty of an advocate, so much more

is it the duty of a court, when a legal question, within legal limits, is to be disposed of, to meet that question and determine it, as a juridical inquiry; and when the responsibilities of the judge and of the advocate are discharged, if the law drives into slavery these unfortunate appellants to your judgment, then, as servants of the law, you are acquitted. The ministers of justice do not always perform an agreeable duty. But, every consideration drawn from general jurisprudence, drawn from the nature of man, drawn from the immutable qualities of right and wrong, may be rightfully invoked in such an inquiry. Unless we live under a government that has renounced all these principles, that, on inducements of policy, of interest, or of whatever perverse influence has guided the public councils, stands upon a denial of natural right, upon the overthrow of general justice, and has established the public policy of injustice and oppression; unless the court sits under a government that has avowed and maintained, and calls upon it to avow and maintain, such a desertion of common right and natural justice, then, all arguments, and all illustrations that bring the judgment of a free court of a free people to determine what their law is, and how it should be administered, are, in this inquiry, pertinent and appropriate.

But, if the Court please, the magnitude of this question is not limited to its pressure upon the liberty of the particular persons whose case is before the court. As a part, (and a part not to be evaded), of the consideration and determination, both in the legislative councils and in the courts of judicature, of the nation, and of the separate States, of the question that grows out of the existence in this country, in slavery, of negroes and their descendants, the present inquiry attracts great public attention.

Beyond the *status* of domestic slavery, as a local institution—established, administered, construed and defended in and by the States, which, under our Federal system maintain it—three forms of question will obtrude themselves on public attention, and cannot be avoided. The one is—What is the power and authority of the governments of the States that continue and maintain the institution of slavery, in respect of the free citizens or free inhabitants of this country, to protect, by their exclusion, or by their control while within these communities, this institution of slavery, against violent, against legal, against moral, against religious, against social influences, that may disintegrate and destroy it? This right, asserted to the extent of *absolute control*, upon the necessity of self-preservation, has never been permitted to be the subject of calm, judicial inquiry within the States that support slavery. Whether free black citizens, or free black inhabitants (if they be not citizens), of the free States of the Union, shall be permitted in their pursuits of navigation or otherwise, to come within the territory of a slaveholding State; whether white mechanics, merchants, landowners, whether teachers and preachers, free citizens of the United States, shall be permitted within the slaveholding States to establish their residence permanently or temporarily, and pursue their vocations; or whether the institution of slavery, of domestic authority, shall have the power to subjugate the free people of the country, morally, socially, and politically, in order that the slaves may be held in personal bondage—these are questions that are exhibiting themselves in a form the most significant and important in various parts of this country. It has never yet been permitted in the slaveholding States, that judicial inquiry should be instituted and prosecuted, to the result of a legal determination of these questions.

Another most important, and in the public mind most absorbing, political topic, touches the footing of this domestic institution of slavery in, and in respect to, the territories of the United States, that are protected by no government or laws except those of the Federal Union. This question, agitated in the public councils, agitated in the popular mind, and discussed to a certain extent in the Supreme Court of the United States, is one, opinions and determinations upon which are supposed to have an important bearing upon the third and last remaining inquiry connected with the general subject.

And that is, what is the legal position of the domestic institution of slavery, as existing in the slave States, in regard to slaves and their owners, when brought within the free States, that are governed by their own constitutions and laws, expounded and administered by their own courts? That is the question now before your honors; and that question concerns what is of more vital importance to a political community, than anything else, its *sovereignty*. It touches not only this question of sovereignty, vital to the existence of an independent community, but sovereignty in its most central point—that of the control of the civil and social condition of persons within its borders. For it may be very well understood that if a sovereign State has not the power of determining the political, the civil, the social, the actual condition of persons within its borders, it is because some other power has that control; and how it can be admitted that a foreign government, a foreign jurisprudence, a foreign social condition, can intrude itself into an independent State, and establish for all time, or for any time, for some persons, or for one person, that condition within the State into which the intrusion is made; how this admission can consist with the fundamental idea of the sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend.

But, upon the view of the learned counsel who sustains the pretensions of the State of Virginia, that State either, by its own authority, or by the aid of the Government of the United States, has something to say concerning the legal condition of persons within this State. The pretension that by the paramount dominion of the Federal Constitution we are bound to admit within our borders the institution of slavery, is a claim which, in my judgment, permits of no limitation whatever, of time or of circumstance. It presents, therefore, a question of the first importance. If it were presented to you as merely a question of *comity*, to which you were obliged by your sense of what is fitting and possible, under the recognized will and authority of our own Legislature, why, although the public mind might be awakened, the proposition would not be so alarming as that we are controlled in this matter, not by any judgment of our own as to what is proper, or fitting, or hospitable, but are bound by a superior authority, and to results to which we can put no limits.

Now, if the Court please, it will be found that the very general view, which has been suggested by the counsel for the appellants here, of their claim respecting obligations and duties on our own part, serves no good purpose whatever, but tends to withdraw the attention of the court from the real subject of judicial inquiry. What is the subject of the present judicial inquiry, and how does it arise?

Within this State, and within the limits of the city of New York, were found eight men and women of color; and it was alleged, in such authentic form as our statutes require, to our accredited judicial officer, that these eight persons were restrained of their liberty? What of that? What is it that institutes such an inquiry, and what is the point to be disposed of when such an inquiry is raised? The inquiry is instituted under our statute of Habeas Corpus, one of the main guards and protections of our liberty. For the words "liberty" and "slavery,"—which we may get so used to as to think there is not much difference between them, except that they suggest matters of jurisprudential consideration as to the limits and extent of the one and the other—liberty and slavery, as civil conditions, are practically nothing more nor less than the establishment of laws, and the methods provided for their enforcement, to define and protect the one institution and the other. And, when you look for the liberty that the people of New York enjoy, you find it in their laws and in their system of government. You find their political liberty in the share that they have in the election and change of all persons that form and administer their government. You find their civil liberty, as matter of private and personal right, in the guaranties of the Constitution, and the methods of the public administration of justice,

in the trial by jury, in the Habeas Corpus; and you may have all the fanciful notions of exemption from bodily restraint in the world, yet if you do not have the Habeas Corpus act or some equivalent mode of attracting the public eye and conscience in administering the law, to the condition of people who are restrained of their liberty, you have no personal liberty, for you have no efficient mode of vindicating and defending it.

What does our Habeas Corpus act require, first, in respect to the institution of the investigation, when it shall be alleged to a judicial officer that any person within the State is restrained of his liberty? Why, it creates an absolute legal necessity that the question of fact and of right should at once be withdrawn from the personal or forcible control which exists, and be transferred instantly and completely to the actual and legal control of the State. That is the Habeas Corpus act, that the question of the restraint of a human being in this State, upon any allegation that it exists in fact, should be at once rescued from the determination of force and personal control, and made a question of the State's maintaining the restraint. From that time, in the theory of the law, the restraint, in fact, cannot continue a moment, but by its maintenance by the *law* of the State, enforced and supported by the *power* of the State.

So essential, in a free State, is this practical form of sustaining personal liberty, that it is protected in a way and with a vigor that no other right whatever is protected, or, consistently with some other general and necessary principles, is supposed to be possibly capable of protection. The right to the writ of Habeas Corpus is protected against invasion from the legislative power of the State, under the Constitution; a protection which it shares with various other private rights. But this writ as a matter of judicial administration, is put upon a footing on which the exercise of no other judicial procedure whatever is put—that is, upon an absolute legal necessity that, upon suggestion, the writ shall issue. The judge to whom application is made, has no discretion to withhold the writ; if he refuses it, he exposes himself to fine, as well as to all the consequences of dereliction of absolute official duty.

Why is this? It is to secure, as matter of necessary practical result, that, whatever the future progress of the inquiry and its final determination shall be, the condition of personal and forcible restraint shall not continue one moment, but that, on the fundamental basis of this universal principle of free governments—that whatever is rightly done, is rightly done by law—the transfer shall immediately, completely and irresistibly be made from the private force that accompanied the actual restraint, into the region of law and judicial determination, and from that moment, either the restraint ceases or the law continues it and compels it.

(The Court took a recess.)

On the reassembling of the Court, Mr. Evarts resumed his argument.

I have said, if the Court please, that the policy of our law in support of personal liberty, had seen fit to devise a process whereby any actual restraint upon a person within this State shall be immediately changed, in fact, from the restraint by private force into the restraint of the law, and by the public force; that thereafter the law restrained, and by its authority alone, was any continued deprivation of liberty possible. I have said that this process was the important practical and effectual support of liberty without which liberty might remain as a name, and despotism exist as a system.

Am I wrong in claiming this efficient agency for the writ of Habeas Corpus, and in attributing to it when issued, the consequences I have suggested? The personal liberty of the people of this State might doubtless have been left, in the first instance, to their own protection, or for them to find, by ordinary remedies, redress for its infraction. Thus it might have been left to a person held in bondage or under restraint in this State, to relieve himself by force if he could, and then in an action to recover damages for false imprisonment. This would be so if the Habeas Corpus act

were not in force, and this contest of private force would be determined by superior strength as to who should obtain the victory.

The distinctive trait of the Habeas Corpus act is that it will not tolerate this "*let alone*" policy—that it will not permit the will or power of prince or magistrate, or public officer, or private person to have sway, but always and only the *power of the law*—that it will take an active part in the protection and defence of liberty, and that the existence of the *fact* of restraint shall be the only pre-requisite to remove the question from this region of force and submission into the public jurisdiction of the law.

If this be so, and no one can deny that it is so, from the moment the writ of Habeas Corpus was issued in this case, if these eight persons are held in this State for any period, brief or permanent, in slavery, or if they are sent away from this State into slavery, it is done by the law of the State of New York, and by it alone. For the private dominion of Jonathan and Juliet Lemmon over these persons has been removed by the writ of Habeas Corpus, and they stand in this court for its judgment and control, as the law shall award. The process once set in motion, there is no escape from its regular procedure and its final result, and the statute permits no answer that shall continue the restraint, unless it shall disclose some cause in law sufficient.

Now, what is answered to the exigency of this writ? The petition for the writ alleges that these persons "were, and each of them was, yesterday confined and restrained of their liberty on board the steamer Richmond City, or City of Richmond, so called in the harbor of New York, and taken therefrom last night, and are now confined in house No. 5 Carlisle street in New York, and that they are not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree." The supposed cause of restraint is then set forth by the petitioner, but as the return states it, we need not consider the charges of the petition in this behalf. The answer gives as legal reason for holding them in the restraint thus admitted to exist, that in the State of Virginia, the respondents, Jonathan and Juliet Lemmon, being there residents and citizens, these eight persons were their slaves: that they, planning an emigration from Virginia to Texas, where the institution of slavery, equivalent to that under the laws of Virginia, existed, took passage in a steamer to the city of New York and there landed, awaiting the commencement of a new voyage, that should carry them to Texas; that their residence or being in the State of New York was as part of that transit, and with no other plan or design in regard to their remaining except to complete that proposed voyage from New York to Texas: And they claim that the restraint exercised is justified under the laws of New York, by reason of the facts they have stated. That is the case, and that being the case, it is for the court to determine whether by the laws of New York, that is legal cause of restraint; and if it be, to give the whole power of the law and of the State of New York to maintain that restraint.

The statute provides that upon the return made to the writ "the court or officer before whom the party shall be brought on such writ of Habeas Corpus, shall immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party. If no *legal cause* be shown for such imprisonment or restraint, or for the continuation thereof, such court or officer shall discharge such party from the custody or restraint under which he is held."

The necessary result of this procedure, introduced by the writ of Habeas Corpus, is thus shown to be the discharge of these persons from the control under which they are found, unless some *legal cause* shall have, by the return, been shown for the continuance of the restraint complained of.

The only question, then, was, and is, whether the relation of slavery (as

described in terms in the return), existing in Virginia, and existing conformably with the laws of Virginia, is a cause for the restraint by our law, of these persons under the dominion of their owners as slaves in New York, during a brief or other stay, under the circumstances detailed in the return, and so as to compel the authority of our State to be actively exerted to maintain and continue such restraint of liberty.

We are first, then, brought to the inquiry of what a legal cause of restraint is. It is, I take it, an identical proposition to say, that legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this State. From whatever source this authority of law is derived—whether it be directly from State legislation, or is found in the unwritten common (or customary) law of the State itself, or whether it be from the Federal Government, whose Constitution and statutes have as perfect authority within this State, as laws originating by State enactment, or by the adoption for the time being under the principles of comity, or for whatever reason, of a foreign system of law (as a fragment and casually, if you please), it must have the compulsory force of law in this State or it is no answer to the writ. Under this last head of authority the inquiry is, whether our law, finding such restraint maintained or permitted by other communities with which we have intercourse, chooses to say that, under certain circumstances and limited conditions, it will interpose and continue that restraint on persons passing through our territory. Your honors will see, that though you may ascribe to these three sources of authority, the means or grounds for the restraint under consideration, yet after all, they are but two; the authentic and original law of our State, and the authentic and original law of the Federal Government. For the legal policy that may make possible and exceptional, in favor of strangers, a condition of things that we do not permit to our own citizens or tolerate in our own population, though called by the name of *comity*, must after all, be a part of the jurisprudence either of the Federal Government in force within this State or of the State Government, administered by our courts.

Having thus, as I think, rightly put before the court the real point for its consideration, and assigned the true limits from which the rules for its adjudication must be furnished, let us look for a moment at the position taken by our opponents. As I understand the learned counsel who supports the pretensions of the State of Virginia, and maintains the case of the appellants here, the form and substance of his argument may be briefly divided thus: The first point, on which he insists, which includes mere general topics, expanded through the first 17 pages of his brief, is designed as an argument to propitiate the court to a favorable consideration, or at least to an impartial estimate of this stranger, slavery: to show that it is not as bad as it has been painted, and that some of the men who have given it an ill name, have themselves had complacency and toleration for other social faults and defects, in the communities in which they lived, that were quite as bad. Its purpose is to put this court in a disposition to find no repugnance to this institution of slavery, in their own breasts, in the public conscience, or in the sentiment or in the action of this State, as evinced by any legislation, any principles of its common law, any judicial determinations, except as they may find written in the statutes, some imperative prohibition of slavery. He would bring you to think that if this were an open question, (and he will contend that it has been left an open question, so far as any statute of the State is concerned)—there are many reasons of conscience, of justice, of benevolence and of duty, which require the maintenance and continuance of the institution of slavery, and require every man, whose hands are untied, to give it a helping and supporting hand; that you must find yourselves subdued by some hard system of positive law, that prohibits you from being hospitable to this social and civil institution of slavery, to justify this court in frowning upon it. In some future stage of my argument I shall have, more completely and distinctly perhaps, to direct

the attention of the court to some of the many positions and illustrations which are embodied in this forensic plea for slavery. But let me say now, that if this court and our people, cannot be brought to look kindly upon its fragmentary and temporary existence in our midst, but by trampling down, step by step, all the great barriers against oppression that have been raised by the reason, the justice and wisdom of age after age—but by undermining the principles that have built up a great, free and powerful nation, to be the habitation of liberty and justice for the great population of to-day, and for generation after generation yet to come; if the rights, poor, feeble, casual, of the black man, cannot be overborne or overthrown without tearing in pieces the law of nations—confounding all distinctions between civilization and barbarism—subduing right by might, and thinking that force and power can, any day it chooses, call evil, good, and good, evil, and that a few soft phrases and intricate sentences, can obscure, even for an hour, the difference between right and wrong, and the fundamental distinction between a rule of force and a rule of right: then this class of the community, while here in the State of New York, is abundantly safe; for an adoption of the maxims and the principles that are necessarily claimed in this deliberate argument, that force is right, and power is law, can only be expected by reversing the whole tide of civilization, and by bringing into discussion, in courts of justice, that rest upon nothing but the supremacy of reason for their authority, propositions that make foolish the existence of tribunals of justice, when contests of force alone, are important or interesting to man and to society.

The next proposition of the counsel for the appellants is, that up to the time of this judicial inquiry in the court below, there was no legislative act of our State that, by its effect, or in its terms, operated to prevent our courts from withholding a judgment of liberty, on a writ of Habeas Corpus, from slaves brought hither from another State of the Union; and further, that if the statutes of the State, rightly construed, should be held to have that force and effect, under the Constitution of the United States, such statutes are invalid, and no judgment that was based upon such a construction of the law of this State, could be sustained. And this prohibitory control of the Constitution of the United States, over this subject, is based upon the commercial powers of the Federal Government to regulate that kind of intercourse between the States of the Union, and upon the provision or guaranty of the Constitution to the citizens of each State, that they shall be entitled to all the privileges of citizens in the several States. In gaining this effect from the latter clause, the learned counsel hold, by a construction, I think, somewhat novel, that its meaning is, that the citizens of each State, shall have in each other State, not the same rights as the citizens of the State into which they come, but, what the learned counsel describes as, the rights of a *citizen of the United States*, in each State into which they come; and, this being rather a shadowy description of rights, not to be found, I think, defined in any constitution or by any laws, the proposition ends in claiming as the effect of the clause in question, that the citizens of each State, coming into another State, besides the privileges and immunities of citizens enjoyed there, which they are to receive in full, are also to be accorded all the rights that they had at home; and that this clause, (in its natural, and in its established, construction so easily understood, so consonant with general jurisprudence, so important and useful in preserving relations between the citizens of different States, by according freely and at once to every citizen who comes here, the same rights which our citizens have), is turned into an instrument and means of the absolute overthrow of State sovereignty. That is to say, that, under this clause of the Constitution, instead of protecting the citizens of every State against disparaging distinctions in any State, between them and the citizens of that State—instead of being a shield and a guard—the Federal Constitution arms them with the codes and statutes of their own State, which they carry with them, as an additional system of law, to be administered in their favor,

while they remain lawfully within the State to which they have made their visit. I say it comes to this substantially, in terms; and it must come to this if it varies at all from what seems to me, the simple and necessary construction, that its effect is limited to securing to citizens of other States, while here, the same rights and privileges with our own citizens. For, although it is very easy to talk of a "citizen of the United States," it is very difficult to find a citizen of the United States, that is not a citizen of some State, and it is very difficult to find, in my judgment, a citizen of any State who is not a citizen of the United States. I do not see where you will find, in the law or Constitution, any description of citizenship of the United States, as distinguished from citizens of the States, except in regard to persons brought in *ab extra*, persons of foreign nativity, where an operative citizenship, of the United States, proceeds from the Federal power. But none of us that were born here, ever got any right of citizenship of the United States, except by, and from, and in, the fact that we were citizens of some State.

The course that I shall think suitable, if the Court please, to adopt in this direct legal inquiry, under this writ of Habeas Corpus now before the court, will be to say, and, I think, to show, that, as for legal cause for the restraint of these persons within the city of New York, under the circumstances detailed, the Constitution of the United States, and the Federal statutes, give no law whatever—none—and that they have nothing to do with it. In the first place, I state, as a point of elementary constitutional law, that the Federal Constitution, and legislation under it, have, in principle and theory, no concern with the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several States. Is there any doubt on that subject? We are all familiar with the divisions of political opinion, that have arisen on the question whether this or that particular power, sought or claimed to be exercised by the government of the United States, was or was not within the grants of power, in the Federal Constitution. We all know that, as lawyers, we are not unfrequently called upon to determine, whether this or that exercise of governmental power by a State authority is or is not an infraction upon the express or implied power of the Federal Government. But, every lawyer knows, that the whole jurisprudence of State and Federal courts on these subjects—as to whether the express power or necessary implication of power exists in the United States, and whether the particular action of a State Government is a violation of some express prohibition upon its action in the Federal Constitution, or is an intrusion and encroachment upon some explicit or implied power of the Federal Government—every lawyer, I say, knows that the whole matter involved within the limits of this inquiry constitutes, as it were, but the merest fraction of the general rights, laws, institutions, employments, conditions, relations, which build up civilized society, and make up the body of the subjects of the jurisdiction of the several State governments.

It is very difficult to see how it can be claimed that, upon any general theory, the Federal Government has anything to do with any questions regulating the rights and titles to property—regulating the distribution of rank and orders in society, if they should ever come to exist, or at all touching the great social fabric, which makes up a civil State. I am, then, justified in saying that, upon the whole theory of the two governments, State and Federal, we are quite free from any *implication*, or *intendment*, that the Federal power has anything to do with the civil conditions and social arrangements within the different States.

If we look at the history of the Constitution, and of the opinions of the men who framed it, we find that a determined stand was made against anything like the establishment of a general government that should exercise authority, at all, over the general fabric and system of the domestic condition of the people. All the different provinces had laws, and customs, and arrangements, with which they were satisfied, and they were unwilling, in the language of Mr. Ellsworth, of Connecticut, "to trust the Federal Govern

ment with their domestic institutions." And we know that, since the formation of the Constitution, its amendments, and the political controversies that have arisen under it, have all tended to confine the General Government to, and to restrict the State Governments only in, the particular and main lines of authority that are delegated in the Federal Constitution.

Now, if we had not looked at the Federal Constitution in this light, it would surprise us to see, in how few provisions, and in relation to how few subjects, it at all touches, or makes mention of, the condition of people within the States. There are but four references, as I construe the Constitution, that can bear this construction.

The first is a reference to the civil conditions obtaining within the States to furnish an artificial enumeration of persons, as the basis of Federal Representation and direct taxation, distributively between the States.

The Constitution establishes a rule for the distribution of representation in the Federal Government, among the different States of the Union, by a reference to the condition of people within it—that is to say, instead of adopting the natural numeration of population throughout this country, as the basis of distribution of federal representation, it does establish, an artificial rule or method of count, for that purpose recognizing social differences of condition in parts of the population. It does not make any discrimination between *States*, but says throughout all the States, from Massachusetts to Georgia, you shall count all the people that come within a certain description, (which is intended to include everybody but slaves, without the odium of naming them), and then count three-fifths of the rest, who can be none others than slaves.

The second reference of the Federal Constitution, is to *the political rights of suffrage within the States*, as supplying the basis of the Federal suffrage in them, respectively.

Here, the Federal Government comes into the States merely to seek what it shall find there : not in the remotest degree to establish anything, to preserve anything, to affirm or continue anything. It is demonstrable that each State has a complete control over the suffrage within it, for all Federal representation.

The Constitution has expressly declared, that whatever each State shall consider a proper basis of suffrage for representation in the more numerous body of its legislature, shall be the basis of suffrage for representation in Congress.

The third provision, one to which I have already referred, is that for securing to the citizens of every State, within every other, the privileges and immunities (whatever they may be) accorded in each to its own citizens.

Let us look at the phraseology of that section, to see whether it bears any other construction than the simple one which I have attached to it. The words are these :

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It is claimed by the learned counsel for the appellants, that this should be construed as if it read : "The citizens of each State shall be entitled to all the privileges and immunities of citizens of *the United States*—in the several States."

But it is very plain, as it seems to me, in the first place, that there is nothing in the condition of a citizen of the United States, which would warrant the suggestion, that there was any intention that he should carry into any State, social or political rights which citizens there did not enjoy. And, in the second place, the natural and necessary construction of the clause is, that the privileges and immunities secured to citizens of each State, while within another, are the privileges and immunities that citizens of the State, where such privileges and immunities shall need to be claimed, enjoy. It establishes, and should establish, a rule of equality and uniformity, not of distinction and confusion.

The fourth provision of the Constitution which comes under our consideration, is familiarly known as the "Fugitive Slave Clause," and reads as follows:

"No person held to service or labor in one State, under the laws thereof, *escaping* into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

This clause, undoubtedly, does affect the condition of persons in the States of the Union. It, undoubtedly, does affect an escaped slave, while within any State of this Union into which he shall have escaped, with certain restraints, impediments, burdens and consequences of restoration, which are not imposed by the government or laws of the State in which he is found. And here, for the first, does the Federal Government, by its own force, put upon this particular class of our population, found in the special predicament of escape from the State in which they owed service, the bonds of Federal obligation, and destroys entirely their recourse to the protection which, otherwise, they could have claimed from the laws of the State in which they are found.

Now I have said that these are the only clauses of the Constitution that can be held in any sense to relate, at all, to the condition of persons, civil or political, in the States of the Union, for any purposes of Government; and that none of these clauses touch the question now under discussion.

The argument to this effect in respect to the "Fugitive Slave Clause," is unanswerable.

The general principles of jurisprudence and the decisions of the Federal Courts, all show that, but for the existence of this clause, an escaped slave would be held by no restraint or coercion, except such as the State in which he was found chose to establish and enforce; and that the rights of the master would rest upon nothing but the comity or the legislation of the State into which the escape had been made. The existence of this clause in the Constitution is not only evidence that the right of reclamation would not have existed but for its insertion; but it is an argument of the utmost force, that even with this clause in the Constitution, no right exists for his master to hold in servitude, in the state of refuge, even an escaped slave. An escaped slave, after he is restored, is held in slavery by the laws of the State whence he escaped and to which he returned, as he was before. But while he is in another State, the "Fugitive Slave Clause" gives no authority *to hold* and use him as a slave. There is no legal answer that can be made to our writ of Habeas Corpus, in respect to a slave escaped into this State, except that he is held by authority of Federal Legislation, under the Constitution, providing the mode of his recapture and restoration to his home of slavery. Whether *now* it would be held by the Federal Judiciary, that there existed a general right on the part of the master, personally, to reclaim the slave by his own direct force, as bail may recover their prisoner, is doubtful. But granting that such right exists, still there is no right to hold him in slavery in the State to which he has escaped. There is the right of taking and carrying him away, undoubtedly, either by the process of Federal law, or, perhaps, by this personal authority that belongs to the relation of bail and prisoner, or master and slave; but not to hold him in slavery; and any attempt to do so, or to do anything except with due diligence to remove the escaped slave to the State from which he escaped, would not be protected against our writ of Habeas Corpus by the Federal Constitution or Federal Legislation.

Before considering the decisions of the United States courts, which I suppose clearly establish the position, that the Federal Legislature and the Federal courts have nothing whatever to do with the subject now before this Court I will, very briefly, place before the Court my views as to the existing law of this State, on the subject of the allowance or permission of slavery within it.

If there is nothing left to be considered but whether our law sustains or

permits this relation of master and slave, if this is the kind of legal restraint necessary to defeat of its proper result, the writ of Habeas Corpus, then we must find in our State law, in some form, an authority for the restraint.

It is necessary for me, here, only to suggest, that it is not requisite, to support a legal restraint, that there should be a positive warrant or mandate of law directing or requiring it. A restraint *permitted* by our law is as good an answer to the writ of Habeas Corpus as a positive warrant or mandate. It is not necessary that we should have a writ of execution, or a warrant of committal, or that the imprisonment should be in the State prison or in a jail, or that, in any form, there should be a direct command of active authority. The relations that our law recognizes, whether or not they be established or regulated by statute, and which give, in their nature, restraint over the person, to this or that degree, constitute a good answer to uphold the exercise of that restraint to that degree. The relations of husband and wife, of parent and child, of guardian and ward, of the drunkard and his committee, of the lunatic and his committee; all these relations, when the exigency of the writ evokes them as a cause of the restraint of persons, are recognized by our law as justifications for such restraint and control as do not exceed the due measure which the law allows to them.

But, if the Court please, there can be nothing recognized by law as an occasion or justification of restraint, except some general *status* established, allowed, recognized, by our law, or, some positive mandate or warrant. In one or the other form, as matter of positive, actual, recognized existence in our State, an answer must be made to the writ, or the liberty of the subject of it is, at once, secure to him. The answer here does not set up any of the natural relations. Nor does it set up the relation of apprentice and master, or of guardian and ward, or any similar relations, which are not natural but yet are lawful relations. The answer is *slavery*; and not slavery of the State of New York, but slavery of the State of Virginia. It is slavery in Virginia, in transit through New York, continuing here the relation created by the law of Virginia, which it is expected, or desired, shall receive the sanction and support of our law, and of this Court, for the special purpose the occasion requires.

But, I maintain, the law of this State does not permit the existence of slavery within its limits. And, first, the *common law* of the State does not permit the existence of slavery within its limits. I now speak of the common law of this State as we understand it, as a system of law governing the relations of persons, and of persons to things in this State, as a body of law discriminated and separated from that which is established by statute. This body of law is derived from England, the source of the common law of this State; and when I say the common law of this State does not permit slavery within its limits, I fear no contradiction, in the known judicial sense of that law.

Whether or not the institution of slavery within this State—while it existed and was regulated by statute, and was modified also, I have no doubt, by subjecting it, in some degree, to the principles of common right and general justice which lie at the foundation of the common law of the State, and of the nation from which we inherited it—whether or not the institution of slavery in this State was, properly speaking, a part of the common law of this State, seems not to be a very important inquiry. I do not suppose it should be, properly, so considered. I suppose that the whole course of legislation, the whole course of judicial determination, treated the whole system of slavery in this State as foreign—not incorporated into our system, not permitted to be moulded into that relation between master and slave which would have followed from its control by the Common law. The cases I have referred to from the English books (and, I take it, they have not been at all shaken by the comments of the learned counsel), the cases show, that, by the common law of England, any such *status* of slavery as is known in

the United States, or as is pleaded here as an answer to the writ, never existed. This is not to be doubted.

Whether, in former times, villenage existed in England, whether it was a monstrously iniquitous oppression, and whether it was inconsistent for British judges to frown upon negro slavery there, in the eighteenth century, because villenage had obtained in earlier times, and whether this inconsistency justly subjects them to my learned friend's derision, may be matter of useful inquiry in some other connection than the present. But the common law of England never knew of this condition of slavery which is pleaded as an answer to the writ of Habeas Corpus, and as legal cause for holding these persons.

The *status* of slavery, therefore, not being established by the common law of England before the Revolution—and that constitutes our common law—we need to find a positive support for slavery among our population, recognized by the public will of the State, as manifested by legislation, in order to sustain it. If obliged to rest upon the common law, it would have no support whatever.

What may, at earlier periods of our history, have been the condition of our statute law on this subject, comes to be rather an idle inquiry, when we consider the plain and comprehensive terms of the existing statute law of the State. My learned friend has called the attention of the Court—rather by way of parenthesis, however—to the statute which it is now necessary to look at more distinctly.

The Revised Statutes, being, in the provisions I am now about to read, a reenactment of the law of 1817, provide, as follows: "No person held as a slave shall be imported, introduced, or brought into this State, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought into the State, contrary to the laws in force at the time, shall be free."—(Section I.)

"Every person born within this State, whether white or colored, is FREE; every person who shall hereafter be born within this State, shall be FREE; and every person brought into this State as a slave, except as authorized by this title, shall be FREE."—(Section 16.)

I cannot think it important gravely to discuss with my learned friend, whether this law, in its proper construction, does proscribe the existence of a slave within this State, and make it a legal impossibility wherever the law has force. He has argued, I know, that, although the Legislature, besides the commercial word "imported," and besides the word, of Latin origin, "introduced" (which means "brought within"), has also used the words "brought into"—that it has failed to make itself fairly understood, or to accomplish the meaning imputed in our construction, *that a slave should not be within this State*. It is said that the true force of these terms is satisfied by the construction, and therefore the true construction of the clause should be, "that no slave shall be incorporated into the population of this State; that no slave shall be brought into it, or imported into it, with the design and purpose that he should become a part of the population of this State." Exactly what that means, exactly what limits to the tolerance or maintenance of slavery in this State, this construction of the statute would impose, it is not easy to say, nor do I care to inquire. I respectfully submit, that the statute is clear, comprehensive, and decisive in its meaning, and in its effect. If the statute has the force of law in this State, there never can be, on any pretence, a person in the condition of slavery within this State, unless some provision of that statute, found between the first and last sections of it which I have read to the Court, gives that right.

Now, we do find certain exceptions made by the statute under consideration, for the allowance of slaves under special circumstances within this

State, and among these exceptions the following, being sections six and seven of the title:

"Sec. 6. Any person not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held by him in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months, and if such residence be continued beyond that time, such person shall be free."

"Sec. 7. Any person who, or whose family shall reside part of the year in this State, and part of the year in any other State, may remove and bring with him or them, from time to time, any person lawfully held by him in slavery, into this State, and may carry such person with him or them, out of this State."

In 1841, this act was passed:

"The third, fourth, fifth, sixth, and seventh sections of Title 7, Chapter 20, of the first part of the Revised Statutes, are hereby repealed."

This express repeal of the sixth and seventh sections, which I have read from the Revised Statutes, presents in the most distinct and absolute form the determination of the people of this State, that the temporary introduction of slavery by transient visitors should not, under any circumstances, be permitted.

Your Honors will perceive that the question now presented is not at all different from what it would have been, while the sixth and seventh sections, that permitted a temporary residence with the slave, were in force, in the case of a slave attempted to be held after the expiration of the limited term. There was a permission for a specified period of time, and a declaration that if that time were overpassed, the slave should be free. Now no hospitality of any kind, or for a moment, is permitted to the master, with his slave, in any sense of retaining him as a slave.

Let us, then, consider a little more fully whether the Federal laws and Federal decisions leave any doubt as to the complete exemption of the several States from Federal control in this matter. Now, your Honors will perceive that, while we talk of *comity* permitting to strangers from communities with which we are in peace, passing through our State, this or that privilege, and so long as the extent of this comity is determined by our jurisprudence and by our own Statutes—we do control entirely the condition of persons within our State. If judicial determinations, at any time, show greater hospitality to foreign institutions than public sentiment approves, the Legislature may limit, or wholly terminate that comity.

But when it is claimed that by a superior and paramount law Mr. and Mrs. Lemmon can make a good answer to the writ of Habeas Corpus, in this State, that they hold these eight persons in New York as their slaves, until they, in pursuance of their proposed voyage, should take them away,—that they bring and hold their slaves here by paramount law, and that law is found in the Constitution of the United States, the question arises: where is the limit of that right? I defy the learned counsel for the appellants, if he claims this right under the Constitution of the United States, to fix a limit of any kind, either in time, in circumstance or in the tenure of slavery here—unless it is to be left to some tribunal to say whether the maintenance of slavery under the circumstances, and for the time claimed, is within some general obligation of respect and regard between the different States of this Union. And this brings the question back to the region of *comity*, and not of right.

There is no stopping place, in my judgment, for the *right* claimed under the Constitution of the United States, short of allowing the continuance and maintenance of slavery just so long as citizens of other States shall choose to reside within this State, without surrendering their character of citizens of other States. According, the claim now, as I understand it, is

that Virginians coming here, can bring their slaves and keep them here as long as they remain Virginians. The claim is one of vast proportions, if it be any claim at all; it has no self-imposed limitations whatever. In nature and substance it is a claim that citizens of each State may carry into other States, the institutions of their own State. Now, the exclusion of slavery from the States has been the subject of legislation quite as much in the slave as in the free States. I doubt whether there is a slave State in the Union that has not, at some time or to some extent, legislated for the exclusion of slaves from its territory, and prescribed, as the direct and immediate consequence of their introduction, that they should become free. Will any one draw a distinction between the right of excluding slaves from a State from the love of liberty, and excluding them from motives of protection and regard for slavery? If South Carolina, from fear of being over-stocked with slaves, legislates to prevent the introduction of more slaves; and if New York regarding one slave an overstock, legislates to exclude that one, is there any difference as to the *power* of legislation, growing out of the motive and purpose of it? I take it not. Virginia, as early as her emancipation from the dominion of the British crown permitted, in 1778, passed a law prohibiting the introduction of slaves into Virginia, and prefaced it with a preamble that she had been prevented from doing it, before then, "by the inhuman exercise of the *вето* of the King of England." That law and its preamble are a good answer, from the State of Virginia, to many of the views now supported, in its name and behalf, by the learned counsel.

Certainly slavery cannot be "just, benign, beneficent, consistent with pure benevolence, and, indeed a positive duty,"—if the exclusion and suppression of the institution had been retarded by an act of authority, which was justly stigmatized as *inhuman*. Certainly we might suspect that slavery itself was inhuman, if the suppression of it was only stopped by an act of inhuman tyranny.

But later legislation, and legislation that has been brought into judicial controversy in the slave States and in the Federal tribunals, has busied itself upon this same subject. The case of Groves and Slaughter (15 Peters) was considered, and should be considered, and is tenaciously adhered to by the present Chief Justice of the United States, as a decision that the Federal government has no voice or authority on the subject whatever. How did that case arise? The Constitution of Mississippi adopted in 1832, had prohibited the introduction of slaves as merchandise or for sale after the first day of May, 1833. Notwithstanding that provision, there having been no affirmative legislation, defining penalties and affixing consequences to the introduction of slaves and their sale, the people of Mississippi bought a good many slaves from Kentucky and Tennessee, and other States, and gave their notes for them. When the notes became due, the slaves being in Mississippi, and still held as slaves, the collection of the notes was attempted to be defeated on the ground that the consideration was illegal, because the slaves had been introduced into the State of Mississippi, contrary to the provisions of the Constitution. The state courts of Mississippi held that that was a sound view of the law, and that from the payment of the notes, amounting altogether to some millions of dollars, the people of Mississippi were quite free; that they might keep the slaves and not pay the notes. The question was brought up before the Supreme Court of the United States, in the case of Groves *vs.* Slaughter, argued by Mr. Webster, Mr. Clay, and General Jones, on behalf of the note holders, and by Mr. Gilpin, Attorney General, and Mr. Walker of Mississippi, (since much distinguished in public life), on the other side. A very elaborate discussion was had on one question involved, whether the Constitution of Mississippi, by its own vigor, operated such an illegality in the introduction of slaves, as made the notes void; or whether it was only binding upon the Legislature to pass laws that should prohibit their introduction and should affix such consequences—such as forfeiting the purchase, or making the slave free, or declar-

ing the contract or the security void—as they might see fit. It was claimed on the part of the note holders that this Constitutional provision did not, of itself, without legislation under it, create such an illegality in the contract of sale, as defeated the recovery of the note. They contended, further, that if that consequence did follow, so as to be a matter of forensic importance in the case, the Constitution of Mississippi, which excluded the slaves, was, in this provision *invalid*, under the *Constitution of the United States*; that, under the commercial clause, the Federal Government had exclusive jurisdiction over the regulation of commerce between the States; and if commerce between the States, then of commerce in slaves, as well as in any other property. The proposition, therefore, was, that this clause in the Constitution of Mississippi which excluded slaves from the State as *merchandise* was void, under the Constitution of the United States, in its commercial clause. Well, that case was disposed of by the Federal judiciary holding, as matter of law, that the notes were not avoided by the Constitution of Mississippi, but that legislation was needed to produce that effect. But the Court utterly scouted the notion that the clauses of the Constitution of the United States appealed to, had anything to do with this question of the introduction of slaves into either slave or free States. The opinion of the Court was given by Mr. Justice Thompson, and disposed of the cause, as I have said, on the point that the Constitution of Mississippi did not invalidate the notes. But the magnitude of the question involved in this claim that the commercial power of the Union had any authority over the introduction or determination of any *status* inside of a State, induced the court to regard it as a matter concerning which they must express the most decisive opinion. And if it be held that the point already decided disposed of the case, and that the further opinions of the judges were unnecessary and superfluous—why it is at least as good an authority as the reasoning of the judges in the Dred Scott case, beyond the point of decision there, and which is so much relied on in this argument.

At page 506, Mr. Justice McLean states the question. "Can the transfer and sale of slaves from one State to another be regulated by Congress, under the commercial power?" I take it for granted that there is much more sense in claiming that, when the introduction of slaves has some connection with commerce, in a proposed sale, you may invoke the commercial power of the Union, than when their introduction is mere matter of convenience of travel. The learned judge proceeds: "The Constitution treats slaves as persons. By the laws of certain States, slaves are treated as property; and the Constitution of Mississippi prohibits their being brought into that State by citizens of other States, for sale, or as merchandise. Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the States as merchandise, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the Federal authorities; but the Constitution acts upon slaves as persons, and not as property. . . . The Constitution of the United States operates alike on all the States, and one State has the same power over the subject of slavery as every other State. If it be constitutional in one State to abolish or prohibit slavery, it cannot be unconstitutional in another, within its discretion to regulate it. . . . The power over slavery belongs to the States respectively. The right to exercise this power by a State is higher and deeper than the Constitution. This involves the prosperity and may endanger the existence of a State. Its power to guard against or to remedy the evil, rests upon the law of self-preservation—a law vital to every community, and especially to a sovereign State."

Chief Justice TANEY is not at all behind Mr. Justice McLean in his views

of the necessary reservation to the States of complete control over this whole subject. He says, at page 508: "In my judgment, the power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits from another State, either for sale or for any other purpose; and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce or by virtue of any other power conferred by the Constitution of the United States. I do not, however, mean to argue this question. I state my opinion upon it, on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the court has delivered his opinion, might be misconstrued."

Mr. Justice Story, Mr. Justice Thompson, Mr. Justice Wayne, and Mr. Justice McKinley, concurred in these views of the Chief Justice and of Mr. Justice McLean.

The next case to which I will briefly ask your Honors' attention is that of *Prigg vs. The Commonwealth of Pennsylvania*, in the 16th of Peters, and, especially, to the parts of the case that are referred to in my points.

The court is familiar with the general doctrine of that case. It raised before the Federal Court for decision the question, whether the Constitutional clause which provided for the rendition of fugitives from service, and the legislation under it, made the subject one of exclusive Federal regulation, and whether the statute of the State of Pennsylvania, and of course those of New York and other States, within the same purview, were constitutional.

The exclusive authority of Federal Legislation, in the premises, was fully established, and upon general reasons which established equally, that but for the clause in the Constitution, the whole subject, even in respect to escaped slaves, would have been absolutely and exclusively within the control of State authority.

Judge Story, delivering the opinion of the court, says, (speaking of the fugitive slave clause of the Constitution): "The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property in every State of the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

"By the general Law of Nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Sommersett's case*, Loft's Rep. 1, s. c. 11 "State Trials," by Harg, 340, s. c., 20 Howell's "State Trials, 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within

its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and endangered perpetual strife between the different States. The clause was, therefore, of the last importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity."

Again, at pages 622 and 623, he says; "In the first place, it is material to state, (what has already been incidentally hinted at), that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the Constitution of the United States, and are there, for the first time, recognized and established in that peculiar character. Before the adoption of the Constitution, no State had any power whatever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other States. Whenever the right was acknowledged or the duty enforced in any State, it was as a matter of comity and favor, and not as a matter of strict moral, political, or international obligation or duty. Under the Constitution it is recognized as an absolute, positive, right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State sovereignty or State legislation. It is, therefore, in a just sense a new and positive right, independent of comity, confined to no territorial limits, and bounded by no State institutions or policy."

And, at page 625 he proceeds: "These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusive in Congress. To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto."

These opinions, included in the judgment as pronounced by the Court, were assented to by all the judges who assisted in the actual determination of the case.

The next case is that of *Strader vs. Graham*, in 10th Howard, and was of this kind: Graham was a Kentucky slave-owner, and had permitted some of his slaves to cross over into the State of Ohio, habitually, for the purpose of instruction in music, designing to retain his property in them, and to make this talent, thus to be cultivated, productive to himself. The slaves receiving this instruction returned to their master, and afterward fled from his service, making their escape by means of a steamboat on the Ohio River.

By the law of Kentucky, in the protection of slave property against such casualties as this, the proprietors of any steamboat or other vessel upon the river, by means of which the escape should be made, are made responsible to the slave-owners in an action for the value of the slave. An action was brought, under this law, by Graham, against the owners of the boat, upon which the escape had been made, in equity to enforce a lien, given by the statute, against the boat. The litigation, commenced in the State Court of Kentucky, terminated in a final judgment in the Court of last resort, in favor of the slave-owner. From that decision an appeal was taken under the 25th section of the Federal Judiciary act, to the Supreme Court of the United States, the defence in the court below being on the ground, in part at

least as a good and sufficient one, that these slaves had become free by their master's voluntary introduction of them into the State of Ohio, and that the state of slavery thus dissolved was incapable of reinstatement.

The 25th section, as your Honors know, carries up cases from the courts of last resort in the States, when the decision is alleged to have involved the consideration of a right, secured under the Constitution of the United States, and has resulted in a decision adverse to that right.

The appellants in that case, on the question of freedom or slavery, and the considerations it involved, stood precisely, to illustrate the matter, as these appellants now before this court would stand in the Supreme Court of the United States, if your Honors' judgment here, should affirm the judgment of the court below, and an appeal should be prosecuted from your judgment to the Supreme Court of the United States, upon the ground that the right, to which your decision had been adverse, was protected by the Federal Constitution.

Now, the first and important question in all cases that are carried into the Federal Judiciary by that method of appeal is, whether the Appellate Court has jurisdiction of the cause. In other words, whether the judgment below does contain an adjudication upon any right under the Constitution of the United States, and whether the determination has been adverse to the right claimed, for both these elements must be found in the decision of the Court of last resort of the State, or there is no appeal to the Supreme Court of the United States to reverse the judgment, although it may be clearly erroneous. The direct point therefore, of Federal control over the civil *status* of persons within the States, was raised in the case of *Strader vs. Graham*, as a question of *jurisdiction*.

Chief Justice Taney, in delivering the opinion of the Court, says: "The Louisville Chancery Court finally decided, that the negroes in question were his slaves, and that he was entitled to recover \$3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with the costs of suit. This decree was afterward affirmed in the Court of Appeals in Kentucky, and the case is brought here by writ of error upon that judgment.

"Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the State Court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio had made them free when they returned to Kentucky.

"But this question is not before us. Every State has an undoubted right to determine the *status*, or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations are imposed upon them by the Constitution of the United States, and there is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The Court of Appeals have determined, that by the laws of the State they continue to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it."

A comparison of this case with the *Dred Scott* decision, and with the narrative of the litigation concerning *Dred Scott*, as given in the report of that decision, will exhibit to the Court the reason, as I suppose, that the *Dred Scott* controversy was not brought into the Supreme Court of the United States, by appeal from the judgment of the Court of Missouri.

The litigation concerning the liberty of Dred Scott, generally considered to have been a case made up for the purpose of raising certain questions for judicial determination, started in the courts of the State of Missouri, and had reached final judgment in the last court of that State, adverse to the liberty of Scott. Scott claimed his liberty by virtue of the Constitution of the United States, just as the freedom of Kentucky negroes was claimed under the Constitution of the United States. Pending this litigation in the Missouri case, the decision was made in the case of *Strader vs. Graham*, dismissing the appeal under the 25th section for want of jurisdiction. As this absolutely shut out any consideration of the rights or doctrines on which the freedom of Scott was supposed to have been gained, an abandonment of the litigation in the State Courts of Missouri followed, and a new litigation by Scott, in the Federal Court, was commenced, whereby, through regular and general appeals from the Circuit Court to the Supreme Court of the United States, the whole cause was brought up, and the Court found itself, as it thought, at liberty to deliberate upon some matters of grave and general import, political and ethical, after they had disposed of the inquiry as to the freedom of Dred Scott.

The case *Ex parte Simmons* (4 Wash. C. C. R. 396), to which I have referred your honors, seems a direct authority upon the question before us.

There the question was, as to the freedom of a slave, brought voluntarily by his master into the State of Pennsylvania, during the prevalence of laws there which permitted the temporary residence of a master with his slave within the jurisdiction of that State. The period allowed by the statute being overpassed, the point was whether the slave was entitled to his liberty, and Judge Washington decided that he was.

I come now, if the Court please, to the decision in the *Dred Scott Case*, the general doctrines of which are invoked by the appellants here, as appears by the brief, though not insisted upon orally in the argument, and my learned friend has not called the attention of the Court to the particular principles laid down in the case, upon which his reliance was based. The general character of that case, and the exact limit of judicial inquiry, that its facts presented, have been already fully stated by my learned associate.

An examination of the opinion of Judge Nelson in that case, will show that he has confined himself to the precise inquiry that the litigation properly presented for judicial determination, to wit, whether Dred Scott was, in Missouri, and by its law, a *slave*.

If he was a *slave*, it must be universally conceded, that he was not a *citizen*. As the jurisdiction in question, of the Federal judiciary is confined to suits between *citizens* of different States, the moment you put the plaintiff in the condition of not being a citizen of any State, of having no citizenship, and no civil rights whatever, of course there is no jurisdiction, as the plaintiffs standing in court rests, not upon personality, but upon citizenship.

But the Court after deciding this, did, through many of their judges, express opinions upon, and elaborately argue, two very important general principles, one of a political nature, and the other coming within the larger range of general ethics and morality. One of these points was, that the restrictive clause of the Missouri Compromise act was unconstitutional and void. There was an opportunity for discussion, though none for decision, on that point, by reason of this fact. Although the question of Dred Scott's freedom was fairly presented by a two years' residence with his master in the State of Illinois—a residence, with the effect of which the validity or invalidity of the Missouri Compromise act had nothing to do—yet, as the question of the freedom of his children and of his wife was also involved in the case, their residence, upon which their claim of liberty rested, happened to be within the portion of the Missouri territory secured to freedom by the restriction of the Missouri Compromise act, subject, of course, to its constitutional validity. The other point of inquiry was purely historical and ethical, and resulted in a very

brief and summary deduction by the learned Chief Justice, from the judicial and general annals of the country, that black men have no rights "that white men are bound to respect." Now both these topics are without any application to the real inquiry before this Court, and I have no occasion to refer to the Dred Scott decision, as a determination or discussion of the *status* of slavery in the territories of the United States.

That subject is to be considered, either legislatively or judicially, where it may properly arise. But I understand the *principles* announced in the opinions of the judges who concur in the judgment of the Court in the Dred Scott case, to establish, in the fullest manner, the entire control of State authority over the condition of all people within it, and to re-affirm the decisions of the Supreme Court, to which I have called your Honors' attention.

Thus, the Chief Justice, delivering the opinion of the court, says:

"But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery, by being brought back to Missouri.

"Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this Court, upon much consideration, in the case of Strader et al vs. Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterward brought back to Kentucky. And this Court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State Court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned on it, as will be seen by the report of the case.

"So in this case, as Scott was a slave when taken into the State of Illinois by his owner, and there held as such, and brought back in that character, his *status*, as free or slave, depended upon the laws of Missouri, and not of Illinois.

"It has however been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of Strader vs. Graham, where it appeared by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may at one time have been entertained on this subject, we are satisfied upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

"Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State Court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the Court.

"The case was carried before the Supreme Court of the State; was fully argued there; and that Court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State Court, which had given a different decision.

"If the plaintiff supposed that this judgment of the State Court was erroneous, and that this Court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this Court, was by writ

of error directed to the Supreme Court of the State, requiring it to transmit the record to this Court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of *Strader and others vs. Graham*, is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy."

Is it not entirely clear that the same principles of reasoning and construction apply to this case, now before your Honors, and that your judgment is not the subject of appeal to the Supreme Court of the United States?

Mr. Justice Nelson, on the same point, says: "This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow."

"In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction."

"As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories."

"Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign not merely as respects the Federal Government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her."

Now, certainly, if this be good law in favor of slavery, it is good law in favor of liberty. The *status*, slave or free, is the same *status* for consideration and determination, whether the judgment be in favor of slavery, or in favor of liberty. And when, in behalf of the free State of Illinois, it is claimed that it so changes the *status* of any slave, who may come within its borders, that thereafter nothing but positive reenslavement can deprive him of his condition of freedom, and the judgment is, that Missouri must determine that for itself; when Virginia claims that slaves held lawfully, within its limits, may still retain that condition in the State of New York, must not the decision be that New York must determine that for itself, by its own inherent sovereignty, uncontrolled by the Federal Constitution, and that the Supreme Court at Washington has no jurisdiction to reverse the judgment of this high tribunal?

I read now from the Opinion of Mr Justice Campbell:

"The principles which this Court have pronounced, condemn the pretension then made on behalf of the legislative department. In *Groves vs. Slaughter* (15 Pet.), the Chief Justice said: 'The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits.' Justice McLean said: 'The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State.' In *Pollard's Lessee vs. Hagan* (8 How. 212), the Court says: 'The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or emi-

nent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the Court denies the faculty of the Federal Government to add to its powers by treaty or compact."

So much for the Dred Scott decision, and the opinions of the learned Judges who concurred in the judgment then pronounced. I have cited passages from their opinions above; the whole tenor of the dissenting opinions of Mr. Justice McLean and Mr. Justice Curtis, of course, carrying these principles to even further results.

The passenger case, the State of New York *vs.* Miln (in the 11th of Peters), will be found fully to sustain these views. The later passenger cases, which fill a great part of the 7th of Howard, are much relied upon by the learned counsel for the appellants, and references to them are largely spread upon his points, with the view of showing that this introduction of persons into the States, does, in some sort, fall within the commercial power of Congress, and that the doctrine of these cases, which held invalid the Law of New York, and the similar Law of Massachusetts, imposing a tax upon the introduction of passengers into those States respectively, has a bearing upon the question at bar. Those cases were decided by a Court, as nearly divided as a Court of an uneven number can be—five Judges holding the statutes to be unconstitutional, but solely upon the ground that they were, in effect and form, a tax upon commerce. The five Judges who concurred in the opinion were Justices McLean, Catron, McKinley, Wayne, and Grier. Those who dissented were the Chief Justice and Justices Nelson, Woodbury, and Daniel.

But your Honors will perceive that the majority of the Court was made by the adhesion of Justice McLean to the decision. The Chief Justice manfully contended that the decision in *Groves vs. Slaughter*, had foreclosed the Court from considering any question, even as a question of taxation, touching the regulation or prevention of the introduction of any persons, into the States, this being a most sensitive point with the slaveholding States. Mr. Justice McLean, however, joined in the opinion that it was a tax upon commerce, and, in that light alone, regarded the State laws as an unconstitutional interference with the commercial power of Congress. The criticism which I have made upon the composition of the majority of the Court in the instance of Justice McLean, will apply to Justice Wayne and the other members of the Court from slaveholding States, who never have been doubtful in their opinions or judgments upon this exclusive control, by the Slave States, of the whole subject of slavery.

A reference to the opinions of the majority of the Court in these cases will show, that it is solely as taxation upon commerce, imposed upon a vessel as it arrives, with its freight of passengers on board, that interference with the commercial power of the Federal Constitution can be rightfully charged upon the State legislation then brought in question. Your Honors are aware that the modification of our passenger laws, made in consequence of the decisions I have cited, have accomplished, in effect, and in result, substantially the same security and indemnity to this State, against the introduction of burdensome emigrants, as the obnoxious laws produced.

The method now taken, exacts a bond that each passenger shall not become chargeable upon the State, and then, by a general provision, permits in lieu of this bond a moderate commutation in money. The Chief Justice in his dissenting opinion in these cases, reiterates his opinions so plainly and decisively expressed in the cases which I have cited.

The Chief Justice says: "The first inquiry is, whether, under the Constitution of the United States, the Federal Government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or the pleasure of the United States to admit. In my judgment, the question lies at the foundation of the controversy in this case. I do not mean to say that the General Government have, by treaty, or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think

there is no treaty, or act of Congress, which can be justly so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this Court could neither recognize nor enforce.

"I had supposed this question not now open to dispute. It was distinctly decided in *Holmes vs. Jemison* (14 Pet. 540); in *Groves vs. Slaughter* (15 Pet. 449); and in *Prigg vs. The Commonwealth of Pennsylvania* (16 Peters, 539.)

"If these cases are to stand, the right of the States is undoubted.

"If the State has the power to determine whether the persons objected to shall remain in the State in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of *Groves vs. Slaughter*, the Mississippi Constitution prohibited the entry of the objectionable persons, and the opinions of the Court throughout treat the exercise of this power as being the same with that of expelling them after they have entered.

"Neither can this be a concurrent power, and whether it belongs to the General or to the State Government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States possess it, then any act on the subject by the General Government, in conflict with the State law, would also be void, and this Court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the States as to who should and who should not be permitted to reside in a State, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion.

"I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several States have a right to remove from among their people, and to prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interest and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the General Government."

This review of the judgments of the Federal Court shows, that in whatever points the judgment and doctrines of the Supreme Court of the United States, as recently promulgated, may be supposed to be unfavorable to personal liberty, they cannot be charged with being at all inconsiderate of the vital and essential point, that within the States, the civil and social condition of all persons is exclusively governed by State authority, excepting only in the precise case of a fugitive from labor. In that case the inquiry arises not under the commercial clause, nor under the privilege and immunity clause, but under the express clause applicable, in terms, to the subject.

Before passing from this topic, I ought, perhaps, to notice one suggestion in regard to the construction of this privilege and immunity clause, that to give it its apparent and natural meaning, involves an absurdity. It is said for a citizen of Virginia to claim, by virtue of that clause, in the State of New York, the full privileges of a citizen of New York, would include the *political* rights of a citizen in the government of the State. The very statement of this difficulty refutes it. The clause con-

fers or secures no privileges or immunities, except so long as the sojourner remains a citizen of the State whence he comes. Its operation ceases, the moment the citizenship of the State into which he has come, is assumed. It cannot, therefore, clothe the sojourner with rights, the exercise of which transmutes him, by the mere act, into a citizen of the new State, and, by the same act, divests him of his original citizenship. No one can be a citizen of two independent sovereignties at the same time. The required limitation it found in the terms used, and in the nature of the subject to which they are applied.

I now beg to ask the attention of the Court to some cases in the Virginia reports, of much interest on this subject, of the power of a sovereign State over the *status* of slavery within it, and of the limitation of the condition of slavery to that form and extent alone, in which it is supported by the positive law of the State. The case of *Butt vs. Rachael*, found in 4 *Munford's Reports*, page 209, was decided in 1813, in the Court of Appeals of Virginia. The case did not arise under the Constitution of the United States, but affirms the general doctrine, that no State, even if it has a *status* of slavery within it, and recognizes such condition in its population as lawful and politic, by comity, recognizes the lawfulness within its borders of any other than that very slavery which its own law creates and upholds. The note of the case is as follows:

"A native American brought into Virginia since the year 1691, could not lawfully be held in slavery here; notwithstanding such Indian was a slave in the country from which he or she was brought."

Now, this slave introduced into Virginia, and concerning whose *status* this litigation was raised, was brought from the island of Jamaica, and was lawfully there a slave in the hands of his master. The master coming into Virginia with the slave, claimed the right of holding him in slavery there.

Your Honors will not fail to notice how differently Virginia stood in relation to this subject of slavery, from the State of New York. Virginia did not proscribe the enslavement of Indians as an unlawful source of slavery; on the contrary, as your Honors have been informed by the learned counsel for the appellants, the comprehension of slavery in Virginia embraced the native tribes; many of their number became slaves, and, now, their descendants form a portion of the slave population of Virginia.

But, in 1691, the colonial government of Virginia passed a law, not, in terms, abolishing the system of Indian slavery, but a law permitting free trade with the Indians. This statute was immediately seized upon by the Courts of Justice of Virginia, as involving the necessary legal intendment, that the enslavement of these people, that were thus recognized as lawful parties to commercial intercourse, was unlawful, such recognition being inconsistent with the absolute denial of personal rights, which lay at the foundation of slavery.

Here, then, was a question of the hospitality of the laws and policy of Virginia, a slaveholding community, to this condition, in the person of a slave brought within it from another slaveholding community. Certainly none of the reasons for aversion to, and proscription of, slavery, *per se*, could very well apply, on the part of Virginia, against permitting this imported slave of Indian origin to continue a slave in Virginia.

But what was the question? It was, whether there was any positive municipal law of Virginia, whereby such a *status* of slavery could be affirmatively maintained, in respect of such a person, and the Court decided that there was not, and that this man, a slave in Jamaica, was free in Virginia.

No slaves but her own could breathe the air of Virginia! The application may seem strange; nevertheless, upon the soundest principles of jurisprudence, of the slave, as well as of the free, States, the judgment was correct.

The cause was argued by Mr. Wickham and Mr. Wirt, two of the ablest lawyers which our country has produced. Mr. Wirt, arguing for the freedom of the alleged slave, says, "Since 1691 no Indian could be held in

bondage. I do not contend merely that Indians could not be *reduced* into slavery, but they could not be *held* as slaves. This was the plain consequence of 'free and open trade with all Indians whatsoever, at all times and in all places.' It was not conferring any boon upon them, but merely acknowledging the rights which God and nature gave."

Mr. Wickham in answer seems to have recognized fully the general rules of jurisprudence for which I have occasion to contend. He says: "Mr. Wirt contends that Indians are, *naturally*, entitled to freedom. So are negroes; but this does not prevent their being slaves. I admit the right to make them slaves must depend on positive institution. What I contend for is, that all persons to whom the general provisions of our slave laws apply, may be slaves here, provided they were slaves by the laws of the country from which they were brought hither."

In the 2d of Henning and Munford, in a case decided in 1808, the same question arose and was thus disposed of in the judgment of the Court. "No native American Indian brought into Virginia since the year 1691, could under any circumstances, be lawfully made a slave."

The remaining consideration, if the Court please, to which I shall ask your attention, and which will require from me some brief illustration, concerns the law of nature and of nations, as bearing upon the doctrine of *comity*. For, after all, a support for this hospitality to slavery, must be looked for from some other source, than in the Constitution or laws of the United States, or in the decisions of the Supreme Court of the United States. No appeal can be addressed to this Court, on which to rest their judicial toleration of slavery, except, first, that the State by its authentic positive legislation has not proscribed and prohibited the temporary allowance of this condition within our territory; or, second, that nothing in the public and general law, or in the customs or institutions of this State, has this effect.

This brings me to the third point of my brief, to which I respectfully ask the attention of the Court.

The citation from Story's "Conflict of Laws" is to the effect that the whole judicial inquiry open to any court is simply, whether in the laws and institutions, social and civil, of the State can be found any such principles as make it possible or proper, that the rights claimed to be exercised during their stay within the State, by transient, or other residents, not subjects or citizens, should be permitted. If the Court find no positive, clear, certain, and explicit expression of the public will through the authentic organs of its manifestation, it may then explore the regions of general jurisprudence and social ethics, to determine whether the desired comity can be extended, without injury to the policy of the State. The reference to Vattel, under the same point gives the view of that eminent publicist upon the *moral personality* of a political society. He says, "Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of *obligations* and rights."

Your inquiry then is, whether this *moral person*, the State of New York, having an understanding and a will of its own, after deliberation, and taking resolutions, has or has not thought fit to manifest hostility to the institution of slavery.

The learned counsel for the State of Virginia says: that the resolution of 1857, passed by the legislature of this State, is not to be taken into account in determining the rights of these parties, or the policy and purpose of the State of New York on the subject of slavery. Well, as far as I can see, this resolution does not really go beyond the scope and effect of the legislation of 1830, as modified by the amendment of 1841, to which I have called the attention of the Court.

This resolution is certainly very moderate in its phrase, to have drawn upon it so severe an epithet from the learned counsel in his points, as to characterize it as "*a treasonable resolution*;" a phrase which, when used otherwise than in the newspapers, or at the hustings, may be supposed to have some definite moral, if not legal, force.

This resolution is simply to this effect: that slavery shall not be allowed within our borders, in any form, or under any pretence, or for any time, however short. The second section of the act of 1830 expressly provides, that nothing in the first section thereof, (the section prohibiting slavery already quoted), shall be deemed "to discharge from service any person held in slavery, in any State of the United States, under the laws thereof, who shall escape into this State." This, certainly, is a loyal and respectful recognition of the binding obligation of the Federal Constitution in respect to the rendition of fugitive slaves. In this state of our law, where is the *treason* in the resolution of 1857? How can there be treason without traitors? Who are the traitors? Is this a bold figure of speech, or does the learned counsel, speaking as the representative, here, of the State of Virginia, mean to be understood as imputing *treason* in act, or word, or thought, to the honorable senators and representatives who joined in that legislative resolution? Is it just, is it suitable to charge a law, or a resolution of this State, with being treasonable, because it does not accord with the learned counsel's construction of the meaning and effect of the Federal Constitution?

Were the laws, by which we taxed passengers, treasonable laws, because the Supreme Court of the United States held that they were unconstitutional? Is a resolution which, only by a most extravagant construction, can, in its own terms, be tortured into a conflict with the fugitive slave clause of the Constitution of the United States, and when there stands upon our statute book an express exception of the case covered by that clause—is such a resolution to be charged with treason? I take it not, and that the epithet can only be excused as an unguarded expression.

But we say, that if the statute cited has not the construction which we claim for it, and if the resolution of 1857, so far as the case at bar is concerned, cannot be regarded as indicating to this Court what the disposition of this State in respect to slavery is, we say, without and aside from such manifest enactment of the sovereign will in the premises, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when and where the domestic laws reject and suppress such *status*, as a civil condition or social relation.

The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population, forbid them in the case of strangers within our own territory.

The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists, it is an ever new and active violation of the law of nature.

Citations from the "*Law of Nature*," I am aware, are open to the objection of vagueness and impossibility of verification, and a grave English judge is said once to have discomfited a rhetorical advocate, who appealed frequently to the "*book of nature*" for his authority, by asking for the volume and page. I am fortunate in my present appeal to the "*law of nature*," in finding a literal and written statement of its proscription of slavery in a document, of which I make profert, and of whose "*absolute verity*," as a record, the counsel for the State of Virginia can hardly make question; I mean, to be sure, the Constitution of the State of Virginia. It is true the portion of this instrument which I shall read, labors under the double opprobrium, of having been originally written when men's minds were inflamed with the love of liberty, at the period of 1776, and of bearing the impress of the same pen which drafted the great charter of our national existence, the Declaration of Independence. But the force of these asper-

sions upon its credit, let us hope, is somewhat broken by its *readoption* in 1829 and again so late as 1851.

In the Bill of Rights of the Constitution of Virginia, and as its first article we find it thus written: "1. That all men are, *by nature*, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

I may be permitted to observe, in passing, that I find in this Virginia "Bill of Rights," a most distinct statement of the doctrine I have asserted, as to the absolute and exclusive supremacy of its own laws in every State. The text reads as follows: "14. That the people have the right of uniform government; and therefore that no government separate from, or independent of, the Government of Virginia, ought to be erected or established within the limits thereof."

That, I take it, means that the laws or customs of no other State are to control the *status* of any person in Virginia, for any length of time, or under any circumstances, but *uniformity* must prevail in the laws and in their administration.

I find, too, in this instrument the best evidence, that the statesmen of Virginia felt no such contempt for "general principles" and their practical influence in the conduct of society, in the framing of government, the enacting and administration of laws, as her learned counsel, here, has made so prominent. The Virginians were always doctrinarians, and liked to see things squarely set forth in black and white. The "Bill of Rights" thus teaches the true basis of freedom and the best hopes for its security. "15. That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles."

But to return to the argument. In dealing with this question of *comity*, we must look with some definiteness at this institution of slavery which seeks, however transiently and casually, the tolerance of our society, the support of our law. We must look slavery square in the face. Certainly, no man could be braver than the learned counsel in the moral, social, juridical, and legal principles which he avows. Yet, I notice that, upon his points, and in his speech, he a little prefers to glide off from the name "slaves" to that of "servants," and from "slavery" to "pupilage."

Now, if we are to determine whether it consists with the spirit of our institutions, with the purity of our justice, to tolerate and enforce, at all, the system of slavery, let us see what it is.

We all agree, I suppose, that slavery, that is, chattel slavery, the institution in question, finds neither origin nor home in any nation, or in any system of jurisprudence, governed by the common law. Among barbarous nations, without law or system, slavery exists, and is maintained by mere force. Among civilized nations it is the creature of the *civil law*.

From an elementary book of acknowledged authority, Taylor's "Elements of the Civil Law" (page 429), I beg to read a concise view of the characteristic traits of this institution. "Slaves were held *pro nullis, pro mortuis, pro quadrupedibus*." That is to say they were looked upon as *no persons*; as those in whom human personality was dead; as *beasts*. "They had no head in the State, no name, title or register; they were not capable of being injured; nor could they take by purchase or descent; they had no heirs and therefore could make no will; exclusive of what was called their *peculium*, whatever they acquired was their master's; they could not plead, nor be pleaded for, but were excluded from all civil concerns whatever; they could not claim the indulgence of absence *reipublice causa*; they were not entitled to the rights and considerations of matrimony, and, therefore, had no relief in case of adultery: nor were they

proper objects of cognation or affinity, but of *quasi cognation* only: they could be sold, transferred or pawned as goods or personal estate, for goods they were and as such they were esteemed."

The laws of the slaveholding States, while they concur in degrading slaves from persons into things, differ in the rules of conveyance and of succession pertaining to them as property. In Louisiana and in Kentucky they are governed, in these respects, by the rules pertaining to *real estate*. In most, if not all, of the other States, they are, in all respects, chattels; as, for instance, in South Carolina, where the law declares, "Slaves shall be deemed, sold, taken, reputed and adjudged in law to be *chattels personal* in the hands of their owners and possessors, and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever."

(2 Brev. Dig. 229. Prince's Dig. 446. Thompson's Dig. 183.)

Such, then, is *slavery*, the *status* now under consideration. Such it continues to be, in all essential traits, while it preserves its identity. It needs positive statutes to relieve it materially from any of these odious traits, to raise the slave into any other condition than that of being *no person*.

When therefore we say that slavery is "just, benign and beneficent," if we have due regard to the appropriate use of words, we mean that that condition, that relation of man to man, is "just, benign and beneficent."

Horrible it is, says the learned counsel, if it be maintained between men of the same race—lamentable, if it be maintained toward men like the Indian, for whom some sentiment may be exhibited; but it is "just, benign and beneficent," if applied to the negro.

This is the condition of slavery, concerning whose tolerance within this State your Honors are to determine, whether the system and order of society in this State permit you, as judges and magistrates to entertain, to maintain, to enforce it. I know of no reported case, in which this true character of slavery, in its just, legal lineaments, is more fairly and candidly considered, in a Slave State, or in a Free State, than in the case of "*The State vs. Mann*," 2d Devereux's Reports, page 263.

The Supreme Court of North Carolina there gives a very careful and deliberate judgment, upon the essential relations between master and slave as established by their laws, as a matter of judicial limitation, and recognition. In delivering the opinion, Judge Ruffin, one of the ablest judges of that State, or of this country, was obliged to say what the nature of slavery was, in respect to the right of the master, and the subjection of the slave. How this case arose, and how necessary it was to meet the questions discussed, the Court will perceive from the very brief narrative which prefaces the case.

"The defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones. On the trial it appeared that the defendant had hired the slave for a year—that during the term the slave had committed some small offence, for which the defendant undertook to chastise her—that while in the act of so doing, the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her.

"His Honor, Judge Daniel, charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave. A verdict was returned for the State, and the defendant appealed.

"Ruffin, Judge. A judge cannot but lament, when such cases as the present are brought into judgment.

"It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist, and are thoroughly understood. The struggle, too, in the judge's own breast, between the feelings of the man and the duty of the magistrate, is a severe one, presenting strong temptation to put aside such questions if it be possible. It is useless however to complain of things inherent in our political state. And it is crimi-

nal in a court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

"The indictment charges a battery upon Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as the State *vs.* Hale, 2d Hawks, 582. No fault is found with the rule then adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here a slave had been *hired* by the defendant, and was in his possession, and the battery was committed during the period of hiring.

"With the liabilities of the hirer to the general owner for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment.

"The query here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury that it is."

"Upon the general question, whether the owner is answerable, *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the Court entertains but little doubt. That he is so liable has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habit and uniform custom of the country in this respect, is the best evidence of the portion of power, deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations, and arguments drawn from the well established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. The difference is that which exists between freedom and slavery, and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterward to assume among freemen. To such an end, and with such an object, moral and intellectual instruction seem the natural means; and for the most part, they are found to suffice. Moderate force is superadded only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed, in his own person and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him of what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness. Such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This disci-

pline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

"That there may be particular instances of cruelty and barbarity, where in conscience the law might properly interfere, is most probable. The difficulty is to determine where a court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the master in that light. The truth is, that we are forbidden to enter upon a chain of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man, at least, if not by the laws of God."

"I repeat that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master and the public tranquillity, greatly dependent upon their subordination, and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

"*Per Curiam.* Let the judgment below be reversed and judgment entered for the defendant."

Now, this is a very gloomy view of slavery. It is however the only view that is permissible of this institution, as a matter of legal power and legal subjection between the parties to it, and it comes precisely to this, that the *slave*, before the law, has *no rights at all*, no more than any mere thing, that, by the law of nature, is subject to the dominion of man. If, indeed, the slave be cruelly injured, as matter of his master's property, then an action for damages will lie, governed, as the Court says, by the "law of bailment." If the State as matter of public policy, chooses to make acts committed in respect to the slave, criminal, it may do so, just as it may acts of malicious mischief in respect of an inanimate substance; as it may protect trees planted in the highway against depredation, or injury, or as it may protect public grounds from intrusion or defilement.

In such cases an indictment under the statute will lie, because the State has so declared. But there is no recognition or comprehension of the slave, *as respects rights or remedies for himself*, within any of the moral, social and human relations that govern duties or rights between person and person.

When, therefore, we are asked to be hospitable in feeling, in speech, or in law, to slavery we must take it as it is, and with the traits which are inseparable from it, and which, as the Court, in the case cited, say, cannot be abrogated without destroying the relation between master and slave, for they exist in the relation itself.

Now, I say, that all history and all jurisprudence show that *slavery* originated in the mere predominance of the physical force of one man over another. That, I take it, must be conceded. It is equally indisputable that it is continued by mere predominance of physical force, or of social force, in the shape of municipal law. Whenever this force fails at any stage, then the *status* falls, for it has nothing to rest upon. When the stranger comes within our territory, and seeks to retain in slavery a person that he claims to be subject to his dominion, he must either rely upon his own *personal* force, or he must appeal to some *municipal law*, which sustains that relation by the pressure of *its* force. When such a claim is made in this State, our answer

is that he has brought with him no system of municipal law, to be a weapon and a shield to this *status*, and he finds no such system here. Where does he find it? We have no such system. We know of no such relations. His appeal to force against nature, to law against justice, to might against right, is vain, and his captive is free.

In *Neal vs. Farrer* (9 Georgia Reports, page 555), the Court will find a distinct adoption of this view, that the title of the slave-owner to his slave is of the kind that I have stated, derived from, and maintained by, force. Indeed, that the planter's title is but the title of the original captor. The action was brought by Nancy Farmer against William Neal to recover damages for the killing of a negro slave, the property of Mrs. Farmer. On the trial, the plaintiff proved the killing and closed. The jury found a verdict for plaintiff for \$825. An objection was made to the legality of the verdict on the ground that, in cases of felony the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. This principle was admitted, but the Court below held that the killing of a slave was not a felony at common law, and refused a new trial. The question of law was brought before the Supreme Court by writ of error.

The Court held, "In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. It is not felony in Georgia, by the common law, to kill a slave, and the only *legal restraint upon the power of a master over the person of the slave in Georgia, is such as is imposed by statute.*"

At page 580 of the report, the learned Court proceeds: "Licensed to hold slave property, the Georgia planter held the slave as a chattel; and whence did he derive title? Either directly from the slave trader, or from those who held under him, and he from the slave captor in Africa. The property in the slave in the planter, became, thus, just the property of the original captor. In the absence of any statutory limitation on that property he holds it as unqualifiedly as the first proprietor held it, and his title and the extent of his property were sanctioned by the usage of nations which had grown into a law.

"There is no sensible account to be given of property in slaves here but this. What were then the rights of the African Chief in the slave which he had captured in war? *The slave was his to sell, or to give, or to kill.*"

The law of nations built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.

Now it is very easy to say, as is said by the learned counsel in his points, that we are not justified in prohibiting the slave owner from any State of the Union, from bringing his slaves hither, and it may be urged that there is no disturbance of our public peace, and no encroachment upon the public morals, or upon social and political principles of this community, in *allowing* the slave-owner to bring his slaves hither, in *allowing* them to remain here, and in *allowing* him to take them away.

But this is not a correct statement of the proposition. It is not a question of the officious interference of our law with the agreeing dispositions of the master and his slaves for the maintenance of the relation. The question in form and substance is, what is the duty of our law, what its authority, what are its powers and processes, what the means and the principles of enforcing it, in case this *amicable agreement* between master and slave shall, at any point of the continuance of the *status* in our community, cease. This was the point with Lord Mansfield in the case of *Sommersett*. Lord Mansfield, if he has been sainted by philanthropists, as the learned counsel has said, for his devotion to liberty, as exhibited in the case of *Sommersett*, very little deserves such peculiar veneration. Lord Mansfield tried as hard as a judge ever did to avoid deciding that case; he was held as firmly by habit, by education, by principle, by all his relations with

society, to what would be called, in the phrase of our day, a conservative and property view of the subject, as any man could be. It is amusing to follow the report in the State Trials, and see how the argument was postponed, from time to time, on a suggestion thrown out by the Court, of the immense influence on property that the decision in the particular case would have. If your Honors please, at the time the point was raised before Lord Mansfield, there were within the realm of England fourteen thousand slaves, brought from the plantations and held, without a suspicion of their right by their masters, under the professional opinions of the eminent lawyers, Sir Charles York and Lord Talbot, that the Virginia negro might be lawfully held as a slave within the realm of England. But, notwithstanding all the suggestions of the Court, for some reason or other, it was not thought useful or proper to cover up, or to buy up this question of personal liberty on English soil and under English law.

Then, Lord Mansfield, being, as my learned friend has suggested, a mere common law judge in a mere common law court, being the Chief Justice of England, a great magistrate, the head of the Court to which was committed the care and protection of the personal rights of the community, as established and regulated and defended by the law of the realm, was obliged, by the mere compulsion of his reason, to decide that case as he did. There is no poetry, no sentiment, no philanthropy, no zeal, no desire to become a subject of saint-hood with future generations, to be found in his decision. Not one word of any of these. It was extorted in submission to the great powers of his own reason. He says, most truly, that the difficulty is, that if slavery be introduced and sustained at all, it must be introduced and sustained according to its length and breadth, with all its incidents and results, and if our law recognizes it, then we must adopt and administer some system of positive municipal law, external to our own, for we have no such domestic *status* in our own society. Therefore, says Lord Mansfield, if the merchants will not settle this case, if no appeal to Parliament for legislation on the subject will be made, and if I must decide it, I do not know of any law of England which permits the master of this vessel, on which the slave Sommersett is embarked, to hold him in confinement and he must be set free. And the Court below was asked to say in this State, "does the law of New York furnish any ground and authority by which it can permit, or sustain, or enforce the restraint upon the liberty of these Virginia negroes, in the city of New York, practised by this man and woman Mr. and Mrs. Lemmon?"

Now, it will readily be seen, as suggested (under subdivision D of my third point), that this consequence must follow; for the idea that our law can have a mere *let alone* policy, can leave these people to manage the affair among themselves, is precluded the moment the process of Habeas Corpus has brought them within the control of the magistrate. Certainly, we have no law to prohibit the master and mistress from coming here with their faithful servants, from remaining here peaceably under this tie of fidelity, and leaving here under the same tie of fidelity.

If there is no writ of Habeas Corpus sued out, if no action of false imprisonment is brought, no complaint for assault and battery is made, and nothing comes up for judicial inquiry, then this contented "pupilage"—this relation of "honorable slaveholder to devoted and attached slaves" is not interfered with by us. When liberty was awarded to these eight persons they were not prohibited from going back to No. 8 Carlisle street, to the dominion of the Lemmons, or from embarking on a steamship for a voyage to Texas. All the judgment declares is, that, if you are restrained *by force*, and *against* your will, there is no such restraint allowed by law.

The question is, as Lord Mansfield says, what the *law* shall do, when *its* force and authority are invoked. It is the same practical difficulty that arose under Dogberry's instructions to the watch: "This is your charge; you shall comprehend all *vagrom* men. You are to bid any man stand, in

the prince's name." "How," inquires the watch, not impertinently, "how, if he will not stand?" Dogberry bravely meets the emergency. "Why, then take no note of him, *but let him go*; and presently call the rest of the watch together, and thank God you are rid of a knave." Whoever, in the name of our law, undertakes to maintain a slave's subjection, will find no wiser counsel than Dogberry's to follow, if the slave objects to his authority.

The train of consequences which must follow from the recognition of slavery by our law, as a *status* within our territory, I have illustrated by a few instances or examples, under subdivision D. of my third point. I will not enlarge upon them. Certainly I take no pleasure in repeating them for any purposes of sarcasm or invective.

I pass now to a subject, considered in distinct propositions upon my points, and concerning which the course of my learned friend's argument requires a few observations from me. I refer to the proposition, that the rule of comity which permits the transit of strangers, and their property through a friendly State, does not require our laws to uphold the relation of slave-owner and slave, within our State, between strangers. By that general system of jurisprudence made up of certain principles held in common by all civilized States, known as the "Law of Nations," in one of the senses in which the term is used by publicists, men are not the subject of property. This proposition the learned counsel has met by the argument, that property does not exist, at all, by the law of nature, but is wholly the growth of civil society and the creature of positive or municipal law. If he means by this argument, that the title of an individual to a particular item or subject of property, is not completely ascertained or established by the law of nature; that I do not make title to the house in which I live, or the books which I read, by the law of nature, I have no dispute with him. But, if he means, that the distinction between *man* as the owner, and *things* as the subjects, of property, does not arise by the law of nature, he is, I think, entirely in error. I suppose, that the relation of man as lord over all ranks of the brute creation, and all inanimate things in this world, is derived from nature, as by direct grant from the Almighty Creator of the world and all things therein; that by this law, the relations of persons to things, which is but another name for the institution of *property*, is a natural relation. If it is not a natural relation—if it does not spring out of the creation of man, and his being placed on this earth by his Maker, I do not understand its origin.

When we accord to strangers a transit through our territory, with property, we limit that right to what is the subject of property by the law of nature, unless our municipal law recognizes property other than such as the law of nature embraces.

But further, the learned counsel has argued, that, because we recognize, under the general principles of comity, certain rights that grow out of the condition of slavery, under the foreign municipal system, which accredits and supports it, we are involved in the obligation of not imputing *immorality* to that relation, and, that, upon the same reasons or inducements of comity, by which we recognize these rights thus grown up, we must enforce and maintain the condition itself in our own municipal system. If the Court please, we ought not to be called upon to confound propositions naturally so distinct as these, and which, I respectfully submit, are justly discriminated upon my printed brief, under subdivision F. of the third point.

We recognize, unquestionably, the establishment of slavery in Virginia as the lawful origin of certain rights, and open our Courts to the maintenance and enforcement of those rights. As the learned counsel has said, if upon the sale of a slave in Virginia a promissory note be taken by the vendor, and suit be brought upon it in our Courts, the action would be sustained; the security would not be avoided as founded upon an immoral or illegal consideration. Nay, further than that. Suppose the relation of master and slave, once lawfully subsisting in Virginia, to have ceased and the slave to have become free, by manumission, or otherwise; suppose the freedman to

have become an inhabitant of our State, and finding his master accessible to process here, to have sued him for wages, for the service in Virginia, while a slave, alleging that he had performed labor and had been paid nothing for it. By our law no such action would lie. No debt accrued by the law of Virginia, and that law must give the right, before our law can afford a remedy. We might suppose the relation to have terminated advantageously to the master, the slave having been a charge and burden upon the master beyond any service he could render. The slave, become free, and found here in the possession of property, could the master sue him here for his support, during the time that, without being remunerated by his labor, he had maintained, fed, clothed and cared for him? Certainly, no such action could be sustained. Apply these principles to the ordinary domestic relations, and there is no mystery in this distinction. We recognize a foreign marriage, good, according to the laws of the community in which it is celebrated, as giving title to property here, in this State, real or personal, dependent upon that relation. When a husband and wife, united under a foreign marriage, come here, we recognize their relation as husband and wife, with such traits and consequences as accord with our laws. But suppose a man to have married a wife in Massachusetts, and that by the law of Massachusetts, while the parties continue there, the husband has the, supposed, common law right to beat his wife with a stick no bigger than his thumb; suppose this a trait of the conjugal relation, a marital right in Massachusetts. Now, the claim of the learned counsel is, not only that we should accord to the relation of marriage arising under the law of Massachusetts, consequences in respect of property here, which belong to the relation, but, that, when husband and wife come here, as residents or, at least, *in transitu*, we should allow this special marital right to continue, and be exercised under our law here, although unlawful between husband and wife by our laws. The absurdity of such a claim strikes every one. If the husband pleaded, as a defence against punishment here, that by the law of Massachusetts, where the marriage was instituted, the violent acts were permitted, no court would tolerate so idle and frivolous a suggestion.

The relation of master and apprentice presents a nearer analogy to that of slavery than any civil relation now recognized by our law. It is wholly the creature of positive statute, and we take no notice whatever of the relation, of the same name and substance, established by the laws of the other States of the Union, as giving any personal *status* within our territory. A master and his apprentice coming here from Connecticut, in the judgment of our law, no longer hold that relation to each other. Our law furnishes no aid to the master's authority, no compulsion upon the apprentice's obedience.

The learned counsel, in his plea for your indulgence to the institution of chattel slavery, has thought to disparage the great names in the British judiciary which have proscribed that condition as unworthy to be tolerated by their laws, by holding up to odium the system of *white slavery*, which, under the name of villenage, long ago subsisted in England.

However nearly the traits of this servitude may, at one time or another, have resembled the system of slavery which finds support and favor in parts of our country, there was always this feature of hope and promise of the amelioration and final extirpation of villenage, which will be sought in vain in the system of slavery in our States. Villenage was within the comprehension and subject always to the influences of the *common law*, which, indeed, is but another name for common right and general justice. No system of injustice and of force brought within the grasp of the principles of the common law, but must, sooner or later, be vanquished and exterminated. The heaviest gloom which rests upon the system of chattel slavery comes from this very fact, that it is outlawed from all these influences; that reason and justice, duty and right, as they reject it, are rejected by it, and

find no inlet through the proof armor of force and interest in which it is cased.

The learned counsel has remarked upon the silent and gradual retreat of villenage before the growing power of justice and civilization, till it finally disappears from English history, one scarcely knows when. It wore out, he says, without bloodshed, without violence, without civil or social disturbance or disquiet. It is not strictly true that villenage was never the cause of serious civil disorder in England. Jack Cade's rebellion and Wat Tyler's insurrection were, really, servile insurrections to which intolerable oppression had urged this abject class. But be this as it may, the learned counsel's complacency, first in the long endurance of villenage, and, second, in its peaceful abrogation, has not restrained him from a sarcastic suggestion, that if there had been in England "a sect of abolitionists" hostile to villenage, that system would have survived to our day. If the tendency and effect of the teachings of this "sect of abolitionists" be, indeed, to confirm and perpetuate the system of slavery, it should attract the favor rather than the wrath of one, who, like my learned friend, thinks slavery to be "just, benign, beneficent, not inconsistent with strict justice, and pure benevolence."

But I can relieve the learned counsel from any doubt or uncertainty as to the efficient influences which caused the decay and final extinction of villenage in England. They were the *common law* and the *Christian religion*.

The common law, having, as I stated, comprehended villenage within its principles and processes, showed it no quarter, but by every art and contrivance reduced it to narrower and narrower limits. It admitted no intendments in its favor, gave every presumption against it; knew no mode to make a villein of a freeman, a hundred to convert a villein into a freeman. Mr. Hargreave, in his celebrated argument in *Sommerset's case*, gives a just account of these successful efforts of the common law. "Another cause," says this eminent lawyer, "which greatly contributed to the extinction of villenage, was the discouragement of it by courts of justice. They always presumed in favor of liberty, throwing the '*onus probandi*' upon the lord, as well in the writ of *Homine Replegiando*, where the villein was plaintiff, as in the *Nativo Habendo*, where he was defendant. Nonsuit of the lord after appearance in a *Nativo Habendo*, which was the writ for asserting the title of slavery, was a bar to another *Nativo Habendo*, and a perpetual enfranchisement; but nonsuit of the villein after appearance in a *Libertate Probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind. If two plaintiffs joined in a *Nativo Habendo*, nonsuit of one was a nonsuit of both; but it was otherwise in a *Libertate Probanda*. The lord could not prosecute for more than two villeins in one *Nativo Habendo*; but any number of villeins of the same blood might join in one *Libertate Probanda*. Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord, from every act or omission which legal refinement could strain into an acknowledgment of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Suffering the villein to be on a jury, to enter into religion and be professed, or to stay a year and a day in ancient *demesne* without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his action without protestation of villenage, imparling in them or assenting to his imparlance, or suffering him to be vouched without counter-pleading the voucher, were also enfranchisements by implication of law. Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward. I have been the more particular in enumerating these instances of extraordinary favor to liberty; because the anxiety of our ancestors to emancipate the ancient villeins, so well accounts for the establishment of any rules of law calculated to obstruct the introduction of a new stock. It was

natural, that the same opinions, which influenced to discountenance the former, should lead to the prevention of the latter."

The other operative agency in the gradual extinction of the offensive system of villenage was the influence of the Christian religion, under the auspices of the church of Rome, then, as well, the national church of England. Macaulay thus ascribes the chief merit in this beneficent social reform to the Romish priesthood. "It is remarkable that the two greatest and most salutary social revolutions which have taken place in England, that revolution, which, in the thirteenth century, put an end to the tyranny of nation over nation, and that revolution which, a few generations later, put an end to the property of man in man, were silently and imperceptibly effected. They struck contemporary observers with no surprise, and have received from historians a very scanty measure of attention. They were brought about neither by legislative regulation nor by physical force. Moral causes noiselessly effaced, first the distinction between Norman and Saxon, and then the distinction between master and slave. None can venture to fix the precise moment at which either distinction ceased. Some faint traces of the old Norman feeling might perhaps have been found late in the fourteenth century. Some faint traces of the institution of villenage were detected by the curious so late as the days of the Stuarts; nor has that institution ever, to this hour, been abolished by statute.

"It would be most unjust not to acknowledge that the chief agent in these two deliverances was religion; and it may, perhaps, be doubted whether a purer religion might not have been found a less efficient agent. The benevolent spirit of the Christian morality is undoubtedly adverse to distinctions of caste. But to the church of Rome such distinctions are peculiarly odious, for they are incompatible with other distinctions which are essential to her system." "How great a part the Catholic ecclesiastics had in the abolition of villenage, we learn from the unexceptionable testimony of Sir Thomas Smith, one of the ablest counsellors of Elizabeth. When the dying slaveholder asked for the last sacraments, his spiritual attendants regularly adjured him, as he loved his soul, to emancipate his brethren, for whom Christ had died. So successfully had the church used her formidable machinery, that before the Reformation came, she had enfranchised almost all the bondmen in the kingdom, except her own, who, to do her justice, seem to have been very tenderly treated." (Hist. Eng. vol. 1, pp. 20, 21.)

These influences, then, of law and of religion were the efficient agents in extirpating villenage, a civil condition which, so long as it subsisted, was a reproach to the liberty of England, and to the principles of the common law. Why should the learned counsel hope to heap opprobrium upon these principles of justice and religion, when invoked in favor of an inferior race, and against a system of slavery so much more oppressive than the system of villenage, because our people who have espoused and maintain views opposed to this present system of wrong against right, and force against justice and nature, are the offspring of the British nation, which, in the early stages of its civilization, had such a system, or a similar system? If these, our ancestors, and we, had nourished and developed it, if we had extended it, if we had made it the basis of prosperity in England and this country, if we had boasted its justice and benevolence, if we had extended it so as to embrace more and more of the nation, if we had made the law astute and even violent to support and maintain it, if we had discouraged every intendment against it, and if it was now approved and applauded as an institution which the civilization and Christianity of the present day accept, then we might well be accused of inconsistency, in being hostile to chattel slavery in the negro race. But, it seems to me, that the influences of the common law of England, which we inherit, and of the Christian religion, as vindicated in the absolute extirpation of villenage from the social system of England, by peaceful means, will suffer no dishonor by performing the same service, and impressing upon the judiciary of this State the same principles of absolute

inhospitality to negro slavery within our borders, even for the briefest period, or over the most narrow space.

If the Court please, the judgment below, the reasons for which are very tersely and properly expressed by the Court which pronounced it, is either to be affirmed or reversed. *You* are to declare the Law of this State. If you declare that slavery may be introduced here, there is no appeal from your decision. If you hold that it may not be introduced here, and affirm the judgment of the Court below, an appeal may carry the question to the Supreme Court of the United States. That such appeal must be dismissed by that Supreme tribunal, for want of jurisdiction of the subject, I confidently submit, must follow from the authorities and the principles I have had the honor to present to this Court.

The result of your judgment cannot be doubtful, if I am right in the opinion, that it is constrained by no paramount control of Federal power. It is as true now, as in the time of Littleton and of Coke, that he shall be adjudged guilty of impiety toward God and of cruelty toward man, who does not favor liberty; and what they, in their day, declared of the law of England, your decision shall pronounce as the law of New York, that, IN EVERY CASE, it shows favor to liberty.

I have, your honors will bear witness, confined myself in this discussion, to mere juridical inquiries, and have strictly abstained from any mention of popular or political considerations. I should not, now, think myself justified in any allusions to those considerations, but for the very distinct suggestion of the learned counsel, that there was a momentous pressure upon the freedom of your judgments in this matter, growing out of a certain formidable, and yet, as he thought, inevitable, result to follow from a decision of this question, adversely to the views he has had occasion to present. He has named to you as the parties to this controversy, the State of New York and the State of Virginia—one, first in population, and in wealth, and greatest in the living energies of her people—the other, richest in the memories of the past, and most powerful in the voices of her dead. I am not aware that the State of New York, in any public act or declaration, has failed, to any degree, of that respect for Virginia, which belongs to her as a sister State, or as a political community. Nor do I know or think that any citizens of this State fall at all behind the learned counsel, in his affection and veneration for the great men in the history of Virginia, by whose careers of public service and of public honors, she has gained the proud title of the Mother of Presidents. Nor do I know that that portion of our people, its great majority, who, with their veneration for Washington, and Jefferson, and Madison, and Henry, and Wythe, and Mason, cherish and defend the opinions upon slavery which those statesmen held, honor them or Virginia less, than those who raise statues of brass or of marble to their memory, and follow their principles with contumely and persecution. I do not know that an imputation can fairly be thrown upon any part of our community, of having less respect and affection for our common country and the Federal Government than is claimed here, by the learned counsel, on behalf of those who, with himself, espouse the views concerning the institution of slavery, which he has presented to the Court. Yet I understand him distinctly to insist here, that, unless this Court shall reverse this judgment, or unless a Court of paramount authority, that can control still further the question, shall reverse it, our Federal system of government is actually in danger—that, indeed, it cannot long exist, without both a judicial and popular recognition of the *legal* universality of slavery throughout our country.

If it please the Court, I am unable to discern in the subject itself, or in the aspect of the political affairs of the country, any grounds for these alarming suggestions, which should disturb, for a moment, your Honors' deliberations or determinations on the subject before you. I may be permitted to say, however, that if the safety and protection of this local, domestic institution of

slavery, in the communities where it is cherished, must ingraft upon our Federal jurisprudence the doctrine that the Federal Constitution, by its own vigor, plants upon the virgin soil of our common territories the growth of chattel slavery—thus putting to an open shame the wisdom and the patriotism of its framers—if they must coerce, by the despotism of violence and terror, into its support at home, their whole white population; if they must exact from the Free States a license and a tolerance for what reasons of conscience and of policy have purged from their own society, and subjugate to this oppression the moral freedom of their citizens; if the institution of slavery, for its local safety and protection, is to press this issue, step by step, to these results; if such folly and madness shall prevail, then, by possibility, a catastrophe may happen: this catastrophe will be, not the overthrow of the general and constituted liberties of this great nation, not the subversion of our common government, but the destruction of this institution, local and limited, which will have provoked a contest with the great forces of liberty and justice which it cannot maintain, and must yield in a conflict which it will, then, be too late to repress.

CLOSING ARGUMENT OF MR. O'CONOR FOR THE APPELLANT.

MAY IT PLEASE THE COURT:—I felt it to be my duty in opening this argument, to discuss general principles only. As it respects adjudged cases, and the conflicting opinions or observations of learned judges, of elementary writers, and of historians, the course and practice of this Court precludes any extended oral comment. To our printed Points we must refer for these details. I shall adhere to that course, in this reply, confining myself to such further remarks as may be proper, upon those general principles in connection with the special topics which my friends on the other side have introduced.

The chief dispute between us in relation to the words of the immunity clause in the Federal Constitution, may be thus stated:

I assert that under our system of government, there is such a thing recognized as a general right of a citizen of the United States distinct from the rights which may belong to the individual as a citizen of a particular State. My learned friends deny this. They say, in substance, that contra-distinguished from citizenship in a particular State, there is no such thing as a citizenship of the United States; and, by way of proving this, they say that no man can be a citizen of the United States without being at the same time a citizen of some particular State.

For the purposes of this argument, I might safely admit the last proposition. If I did, the consequence claimed would not be inevitable.

Though it were true, that the natural being who is a citizen of the United States, must be, at the same time, a citizen of some particular State, still there may be a class of general privileges belonging to citizenship quite distinguishable from those which are peculiar to citizenship in any particular State. And this is our proposition. I claim that the privileges and immunities resulting from citizenship intended to be secured by this clause of the Constitution form a class which exist alike in every citizen of this Republic, irrespective of his domicile, or any personal and peculiar incidental relation whatever. It cannot be denied; it is not denied, that when a citizen of Virginia comes into the State of New York, he does carry with him, by force of this clause in the Federal Constitution, some privileges and immunities. Those privileges and immunities are described in the Constitution simply as those of a citizen. There is here no reference to the State in which he is domiciled, or to the State in which he is found. The single word "citizen," is used in this connection; and I apprehend it is used in its largest and most general sense. To a mind at all conversant with the subject treated of, this guaranty conveys the idea of privileges and im-

munities belonging to citizenship altogether different from the mere rights of citizenship appertaining to one as a citizen of the particular State in which he is, or in which he is domiciled. The words cannot mean either of these things; they must mean something else; and, if we look to the practice which must necessarily obtain under them, this will be apparent.

A citizen of Virginia, when he comes into the State of New York, leaves behind him all his political rights. He ceases to be an elector; he cannot vote even for an officer of the United States government itself. Unless the local authorities please to confer upon him such a privilege, he is not competent to be elected to any office in the State, or under the State law. He leaves behind him all his political rights, and he never acquires any political rights in place of them, until he ceases to be a citizen of Virginia, and by the very fact of losing that character, loses every privilege and immunity which this clause was intended to secure.

Will any Constitutional lawyer deny this? Have the gentlemen on the other side ventured to assert that, under that clause of the Constitution, the citizen of another State, coming into this State, carries with him, acquires, or can use any political right whatever? It cannot be pretended. It is not pretended. This was not the intent, and is not the import of that clause in the Constitution.

Again, among the immunities secured to him by the law of his own domicile, the citizen of Virginia may be exempt from imprisonment for debt; and many other privileges might be supposed. He does not carry that exemption with him, and the moment he is within the State of New York he may be imprisoned for debt. Thus it is made apparent that all his general political rights are left behind him in the State of his domicile; and that all the special and peculiar rights and privileges conferred upon him as a citizen by the laws of his own State, are also left behind him, and no single one of these rights can be used, employed, or enjoyed by him within the State in which he is temporarily a sojourner, or through which he is passing.

Then, it must be manifest that a Virginian does not bring with him into our State, under this clause, the privileges and immunities of a citizen of Virginia. What, then, are the privileges and immunities which, under this clause of the Constitution, he may enjoy in New York? Are they the privileges and immunities of a citizen of New York? Certainly not; certainly not. So long as he is a citizen of Virginia, we have a right to exclude him from holding any office in our State. We have the right to deny him the elective franchise in our State. He can claim no political privileges that we accord to our own citizens or to others; and though we may have a law exempting our own citizens, or even some classes of alien-strangers, from imprisonment for debt, we may subject him to such imprisonment, merely because he is a citizen of Virginia. It is, then, quite apparent, that a citizen of Virginia does not, under this clause, carry with him into the State of New York, and there hold, while he is yet a citizen of Virginia, the rights and privileges of a citizen of Virginia. It is equally clear, that on coming within the State he does not acquire, by force of this clause, any of the rights and privileges, political or personal, which belong to a citizen of this State purely as such citizen. Indeed, it might reverse the whole operation of this immunity clause, and convert it into an instrument of oppression and injustice, to establish that its effect upon the citizen of Virginia, on his coming into this State, is to subject him to all our laws, and vest him with all our privileges, precisely as if he were a citizen of this State. Such a construction might be most destructive to the stranger, as may readily be seen. The State of New York might pass a law, that any of her citizens, owning slave property anywhere, should be deemed guilty of an offence against the State, and liable, upon conviction, to pay into the public treasury of the State a fine, equal to the value of all his slaves. That would be one of the rights—it might be called one of the “privileges”—of a citizen of the State

of New York. And if such a privilege, as my friends might call it, was to be acquired under this provision of the Federal Constitution by the citizen of another State, on his coming within our borders as a traveller, what would be the result? He might be stripped of all his property—even that which he had left behind him within his own State. He might be indicted and condemned for the crime of slaveholding, and be held in bondage until he should sell his slaves and pay the proceeds into our treasury.

It can mean none of these things, what then does this clause mean? What privileges and immunities of citizenship does it refer to and guaranty?

It refers, as we insist, to the rites of hospitality, to the ordinary enjoyment of society during his temporary sojourn with us, the undisturbed possession of his property, and the undisturbed enjoyment of his domestic relations, and of every accessory and incident of a purely personal or domestic character which he may be permitted to enjoy, without invading the peace and happiness of our people. Over this right of free intercourse between the citizens of different States, the States have reserved no power except the police power. That natural and inalienable right of self-defence is indeed reserved to the States.

If a citizen of Virginia should claim the privilege of bringing with him into this State anything which might be dangerous to health, or to morals, anything which would be fatal, or even materially injurious to any of our local interests, it would be our undoubted right to exclude it. But, if your Honors please, while bringing a free negro from the State of New York into the State of Virginia or North Carolina, might involve consequences dangerous to the peace and safety of society there, and consequently a local police regulation forbidding it would be entirely legitimate, it is impossible to maintain, before any rational tribunal, that either the morals, the peace, the safety, or the health of the community in the State of New York could be affected by the simple presence of slaves in the service of our countrymen from the Southern States while travelling through our State, or temporarily in it. I can imagine no evil that could possibly arise from it nor can any probable mischief be proven. It is not apprehended that our free negroes might be contaminated with a love of slavery and forsake our society; nor do I suppose that this, if likely to happen, would be looked upon as any great loss to our State.

One of my learned friends has remarked that this privilege of transit, if accorded to our fellow-citizens of the Southern States, might become a source of much difficulty. He says a right to exercise it would result to our free negroes. He apprehended that that class of citizens, as he called them, might claim the same privilege under this clause of the Constitution, and occasionally visit the Southern States. I do not think there is much danger of it. Few of them have any ambition to play a part in the John Brown dramas of the day. But to that suggestion there is a very short answer. It is this: these free negroes are not, and never can be made citizens of the United States. We may make them citizens of our own State, if we please, by that force which the learned counsel says will now and then override law and beat down reason. Within our own limits we may put them apparently in possession of privileges to which they are not entitled; but we cannot impart to them a citizenship within the meaning of this immunity clause. They are not citizens of the United States and can claim no privileges as such.

Another difficulty suggested is, that the claim now made, brings up for discussion the right of the South to import slaves into the territories; thus compelling a decision of that question. Perhaps that question is involved; and if so, it must be met; and the sooner it is met the better. Undoubtedly our claim also involves another cognate point which has not been suggested. I mean the right of our southern fellow-citizens to employ their slaves in the navigation of vessels in the coasting trade, upon the high seas, and on our great rivers. During such voyages, the vessel is most of the time beyond

the limits and territory of the United States, and may often be within the boundary of some State whose laws do not allow negro slavery as a domestic institution. In this latter case, the owner and his slave-property, though not within a slaveholding State, are in an American ship. The flag, not of New York, or of any particular State, but of our Union, floats over her; the military and naval force of the Union protects her; the laws of Congress determine her rights of navigation, and should determine, as far as may be necessary for the regulation of commerce, the legal *status*, as my friends express it, of all persons on board of her or engaged in navigating her. Of course, those laws should know no distinction between the rights of property, as recognized in one part of the Union, and the rights of property as recognized in any other part of the Union. In respect to the powers of Congress and the regulating power of the General Government, I can see no difference between the deck of an American ship upon the high seas, beyond the limits and jurisdiction of any particular State, and the unreclaimed wilderness, as our public territory may be called, before any other law is introduced.

The territory of the United States necessarily passes through a transition-period. From the time the first settler builds his shanty, until a sufficient number of his countrymen have gathered around him to authorize an admission into the Union, the territory must be governed by the laws of the Union. Until then it is under the protection of the Union; it can have no laws except such as come from the Union. Congress is authorized to regulate commerce and to make all needful rules and regulations respecting the territory belonging to the United States. It has all the powers of government which are necessary for either purpose. This is by separate grants indeed, but both grants are couched in like terms, and they are equally extensive. It cannot be maintained, however, that Congress may exercise either power partially and unequally. That body cannot legislate adversely to the citizens and the domestic institutions of some States, or favor, at their expense, the citizens, the whims, or the caprices of other States. Such an exercise of power is impliedly forbidden by the very nature of the grant and of the subject to which it applies.

If it could be taken out of the arena of party and detached from the rivalries of men struggling for distinction, this subject of slavery in the territories would strike all men alike.

Questions do occasionally present themselves, under our complicated political system, which cannot easily be grasped by ordinary minds. Sometimes we are called upon to reject the influence of precedents in law or government, and from the novelty of the subject are constrained to construct new rules and principles of policy. But no such embarrassments are presented by this question of slavery in the territories. There are ample guides in the former practice of nations, and both common sense and the letter of the Federal Constitution harmonize with the precedents. The first settlers in a new territory are always deemed to carry with them the law of the land from which they come, together with all the customs and usages sanctioned by it. However small their number and humble their condition, they carry with them the morality of that law and its prudential rules and regulations for the establishment of justice. They retain that law, and it is to be enforced amongst them as law, until a new form of government is duly organized. A single peculiarity is developed in the working of this principle as it respects territory belonging to the United States. Those who go into such territory as settlers, do not all come from a country governed by the same system of municipal law. They come from different countries, so to say, each of which has its own municipal law. And between these systems of law there may exist a conflict in some particulars.

A portion of the settlers come from Virginia, where negro slavery is deemed lawful, and another portion come from New York, where that institution is held to be cruel and unjust. What these two classes, thus sitting down together in the wilderness, should do, is the question? The answer to

it seems plain enough. We must apply the general principle, that persons coming from an old State to settle in an unreclaimed wilderness, which has itself as yet no municipal law, must be deemed to carry with them the law of their own country—with the qualifications and modifications necessarily arising out of this single peculiarity which I have adverted to. The United States constitute socially a consolidated nation, but politically a confederation of independent States, with independent and somewhat conflicting local laws. The modification which that circumstance renders necessary is, that the local laws of each State, as they affect all matters necessary to the life and preservation of this infant colony, shall remain in full force and effect, without any of them repelling, breaking down, or overruling the other, until the supreme government which has the right to legislate *ad interim* and during the transition-period, shall have made a different law, or until that young community shall have arrived at maturity and obtained the power of making laws for itself.

Such is the short, simple, plain and rational solution of this territorial question. If the New Yorker who loves negro equality, and does not fancy negro servants, should settle alongside of the Virginian who has a different taste, they can easily live together in amity, neither of them requiring from the other anything but peaceful forbearance. No right of either is invaded by this course.

The Virginian asks no more in respect to his property than simple toleration. If it should become necessary to enact laws during the transition period, and before the new settlement has attained its majority, it is but reasonable that Congress should observe the same toleration. And if it be needful, Congress should enact rules to preserve the domestic relations and the rights of property of each class of settlers. No other line of conduct would produce that equality which the States have a right to claim.

The rights of slave-owners in this territory, or on board of American ships on the high seas, may easily be regulated in harmony with the general principles of the Constitution—with its very letter, and with its spirit, conformably with reason and convenience, and in such a manner as to preserve peace and unity between the States. Justice can be done to all without the least difficulty or embarrassment. It is merely a speculative question whether the express grant of power "to make all needful rules and regulations respecting the territory belonging to the United States," was intended to apply only to the territory already ceded when the Constitution was adopted, or was intended to have a prospective operation so as to include territory that might be subsequently acquired. A governing power within the territories is indispensable: it exists in Congress or nowhere. And whether taken by implication or under these express words, it must be of the same essential character—a power temporarily, to regulate the affairs of the territory to such an extent, as may be necessary during the transition period.

So far as Congress, in exercising this power, enters upon the distinct domain of general municipal government, it departs from the primary purposes of its creation as a merely federal legislature. It may be said to act upon a temporary emergency, the imperious necessity of the case being its main warrant for acting at all. The calls of that necessity should prescribe the limits of its action.

If the express words of the power to make rules and regulations respecting the territory of the United States, were not indeed intended to apply to territory thereafter to be acquired, they, nevertheless, describe more accurately than any other words that could have been employed—the limited character of the powers to which Congress ought to be confined, in governing the territory of the United States, whether newly acquired or preëxisting. Their contrast to the formulæ employed in framing other grants of governing power in the same instrument, performs the office of a curb or limit more effectually than any elaborate definition.

Every express restraint against abuse of power, contained in the Consti-

tation, of course, applies here. But that instrument is pervaded by a general principle touching the exercise of power which is expressly written down in reference to every particular subject, where the danger and the facility of abuse were sufficiently palpable to suggest the precaution. As a common trustee of its special and limited powers for the common benefit of equal sovereign States, all the functions of the Federal Government were, by the very nature of its being, subjected to the obligation of equalizing benefits and burdens toward the States, and their respective interests, as far as practicable. It is very obvious that this implied limitation, applies to every power of Congress. The power to regulate overland commerce between the States—the power to establish mails—to grant patents and copyrights, and many others, are conferred in language the most unlimited and without one literally expressed restraint upon the method of their exercise. But will any one pretend that Congress could exercise any of these powers in such a manner as to discriminate in favor of some States and against others, without a flagrant breach of its Constitutional duties? Perhaps, in some instances, its transgressions might not be removable by the judicial power; but the transgression would not be the less apparent on that account; and other remedies might be resorted to.

It is therefore, quite clear, that in conceding to Congress the power of government in the territories, during the transition period, no more is yielded than necessity requires; nor does the concession arm fanaticism with a new weapon of offence against the rights, feelings or interests of the slaveholding States.

Let it not be said that if Congress has constitutional power to legislate for the territories, it may, without transcending its legitimate authority, pass an act excluding our Southern fellow-citizens from settling in the territories with their agricultural laborers. Undoubtedly, such an act might go through the forms of legislation and find a place upon the statute book; and it might be difficult to point out in the Constitution, a precise, written prohibition, specially directed against the enactment. But it would violate the great pervading principle of equality between the States and their respective interests, which is impressed upon every line of the instrument. With equal propriety Congress might pass an act that rice, an exclusively Southern product, should not be carried within the territory; that cotton should not be worn in it, or indeed, that none but natives of the New England States should be allowed to settle or purchase land in it. It might pass an act abolishing all mail routes and post offices within the slave-holding States, and it might grant patents and copy rights to none but the citizens of non-slave holding States. No man can find within the limits of the Constitution, an express and literal restraint upon any of these outrages. And there is no constitutional restraint, except in the duty of the Federal Government, to administer its powers with fidelity and therein to observe equality toward the respective States and their respective interests as far as practicable.

But for one single pernicious device, this implied restraint would always have been enough. No man of character and common intelligence, would ever have been found bold or brazen enough to justify a departure from this duty; but for the notion of a higher law. Any one may justify his action, if it be enjoined by natural justice and God's command.

Before these, if they be against us, our Union and our Constitution must fall; but they are not against us.

I do not fear any such partial action by Congress. Should it come in reference to slaves, or any other State interest, and no remedy be found within the Constitution, then, indeed, our political compact will have lost its force. In passing such an act, Congress would, like the dying swan, utter its own requiem.

The learned gentleman who last addressed the Court has exhausted his imagination in suggesting instances of direct embarrassment which would arise if we should allow the right of transit. These instances are brought

in under the head of an alleged consequence, which he has also conjured up by the mere force of his inventive powers. He insists that if we go so far as to allow the transit of masters with their slaves, we must go further and must actually bring within our territory and naturalize, support, uphold, and preserve by laws adapted to that purpose, the institution of negro slavery. I do not perceive that any such consequences are involved. Still, let us assume that they are, and look at his catalogue of supposed inconveniences. He has placed them all upon his printed points. I will read them over and briefly glance at each of them.

"If the slave be eloiigned by fraud or force, the owner must have replevin for him, or trover for his value."

I will ask my friend what evil could result from that?

"If a creditor obtain a foreign attachment against the slave-owner, the sheriff must seize and sell the slaves."

Is there any necessity that the State of New York should declare negro slaves liable to levy and sale for debt? May we not, if it pleases our fancies, exempt that kind of property from sale on execution or under attachment, just as we have exempted for each family, six knives and forks and as many cups and saucers?

"If the owner die, the Surrogate must administer the slave as assets."

Pray, why so? May we not, according to the prevailing habit of nations, send that part of the decedent's property back to the domestic forum, there to be disposed of according to law?

"If the slave give birth to offspring, we have a native-born slave."

I will reserve this chimera dire for more special observation.

"If the owner, enforcing obedience to his caprices, maim or slay his slave, we must admit the *status* as a plea in bar to public justice."

Why so? Is not this a most singular assertion! No such plea in bar is admissible in the slaveholding States! Why should it be admitted here?

"If the slave be tried for crime, upon his owner's complaint, the testimony of his fellow-slaves must be excluded."

Why must it be excluded? It is at our sovereign pleasure as an independent State to say what shall and what shall not be admitted as judicial evidence.

"If the slave be imprisoned or executed for crime, the value taken by the State must be made good to the owner, as for private property taken for public use."

Here, again, is a proposition so inconsistent with law, reason and common experience, that I can scarcely treat it with becoming gravity. No such obligation rests upon the State. The State has the natural power of self-defence. It may put away or destroy any person or thing which jeopardizes its safety. We often seize and burn hides and other articles of merchandise which contain the elements of disease, and no man ever supposed that we were bound in such cases to compensate the owner. The agent of disease is not regarded as property taken and applied to the public use; it is regarded as a public enemy, consigned to destruction for the public defence against its pernicious qualities. So it would be with a slave, whose habits or qualities rendered his presence dangerous to the State.

With one notable exception, reserved for more special comment, this is the learned gentleman's list of mischiefs to result from extending to our fellow-citizens of the South the simple privilege of transporting their servants through our territory. How idle and insignificant his terrors appear when fairly confronted!

But I must not overlook my learned friend's principal grievance. He suggests, should this right of free passage through our State be allowed, we may occasionally have "*a native-born slave*."

Let us see what is the extent of this enormity. It is this: The sacred soil of New York may suffer the contamination of having had a negro slave born upon it. Let us contemplate this shocking event in all its

length and breadth. By its happening, our State, in some physical or moral sense, may become almost as degraded and as infamous as that spot of earth where repose the ashes of him whose name and memory we all delight to honor! That shock to the moral sensibilities of our people, if it can help as a make-weight in their argument, my friends are welcome to. For my own part, I do not greatly admire the moral sense or the patriotism of any American who thinks it absolutely necessary to the honor of this country that there should now be, or that there should ever be, in our Republic, a spot purer or more sacred in the esteem of men, than the birthplace or the grave of Washington. However widely our Republic may extend its limits—though the blue field of our National Banner should yet bear a hundred stars, each representing a State as powerful as Virginia or New York—I should little admire the patriotism, and should not at all emulate the fastidious morality of that American who would think it necessary, or would desire that any spot in all our country's wide extent, should be regarded, by men or angels, as more pure than that which is consecrated as the resting-place of our national hero.

This notion of the superior sanctity of one State over another, is the accursed parent of the moral war which has arisen amongst us. It is the fatal seed from which has sprung a host of evils. If it tends to give unmerited and useless liberty to the negro, that is no blessing—it certainly tends to destroy fraternity amongst the whites, and every patriot will recognize that as a curse.

So much for the inconveniences, the embarrassments and difficulties which it is imagined, or pretended, would arise under the law of free transit, as claimed by us. It is plain to common sense that our doctrine involves no practical inconvenience whatever. It is for the stranger and wayfarer that we plead. For him we claim a right of passage—and we claim no more.

On the supposed import of certain judicial opinions, the learned counsel have contended that this Court has absolute authority over this question, and can decide it according to its own *sic volo*, without responsibility to any appellate power. This is a mistake.

In *Strader vs. Graham*, (10 How. 93), it is decided that each State "has a right to determine the status, or domestic and social condition of persons domiciled within its territory." In *Dred Scott's* case, (19 How. 462), Judge Nelson says, "that Scott's *domicil* was always in Missouri; and, consequently, the laws of Missouri must determine his status." In the *Passenger* cases, (7 How. 466), Ch. J. Taney held, that the Federal Government could not compel a State "to receive and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or the pleasure of the United States to admit." At page 467, he also says, that concurrent powers in the State and Federal Governments "as to who should, and who should not, be permitted to *reside* in a State," would be impracticable. These, and a similar remark of Chief Justice Taney in *Groves vs. Slaughter*, (15 Peters, 508), constitute the whole of the learned counsel's authorities, to prove that your Honors have power to determine, irreversibly, the status of these eight negroes.

If they were domiciled in this State; or, if they were brought here for the purpose of remaining or residing here, or for any other purpose than that of simple passage through the State, those citations might be relevant, and your power might be absolute. But such is not the fact. They were not domiciled in this State; it was not intended to keep them here or leave them here. They were here merely *in transitu*. New York is a highway of inter-state commerce; if it affords the most cheap, or convenient, or agreeable line of travel between Texas and Virginia, the citizens of these States may lawfully use it for commercial intercourse, without let, stint, or hindrance.

One of the learned counsel's favored citations proves that this question has not yet been before the Supreme Court of the United States, and that if

it should be erroneously decided against us here, that High Tribunal has jurisdiction to review the judgment and correct the error. In *Dred Scott's* case, (19 How. 468), Mr. Justice Nelson says: "A question has been alluded to on the argument, namely: the right of the master with his slave of transit into or through a Free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the Republic, under the Constitution of the United States. When that question arises, we shall be prepared to decide it."

I will now make a few remarks in reply to the argument on the general subject of negro slavery. On that topic, my learned friends enjoy, in this latitude, the privilege of saying as many witty things as they please, with the certainty of receiving applause from a portion of their auditors. It requires but little firmness to speak in the midst of a friendly circle, and in conformity with its opinions. It requires but little effort of the imagination to introduce, in such a position, tropes and figures that will please those who surround us, and that will draw forth exhibitions of an adverse sentiment toward the stranger who may be present, seeking a disfavored right, or against the advocate who may venture to assert that right in his behalf. This privilege my learned friends enjoy. They are welcome to it. I am sure I could not, here, turn the laugh upon them; and I would not wish to do it if I could. For, in my opinion, at this time, under the circumstances by which we are surrounded, the honorable citizen who can laugh on this subject, must first forget his moral duty. He may have an honest heart and a good understanding, but for the time, he must be insensible to the just influences of either. The question before us is not a laughing matter. One of my learned friends, in this branch of his argument, undertook to define the condition of the slave; and as he found so great a difficulty in defining the much more familiar character, "a citizen of the United States"—inclining, indeed, to the opinion that no such citizens existed—it is not wonderful that he should get a little astray in relation to the terms "slave" and the "state of slavery." He says, virtually, that nothing is slavery except the bondage and subjection of man to man, in the most odious form that can possibly be conceived—an ownership, sheer, pure, absolute and complete. And such, indeed, is the state of slavery, as it has existed in some stages of the world's history—being the slavery of white men to their own countrymen, to masters of their own color and class, their natural equals in all things. That kind of slavery does, indeed, carry with it all the consequences of which my friend speaks. The master absolutely owns his slave; he has power over his life; he may torture him; he may slay him. And for the employment of these high powers he is no more responsible than was the Patriarch in ancient times for exercising the same powers over the child of his own loins. That, to be sure, is slavery, pure and simple, whether applicable to the negro or to the white man. But what do my friends gain by proving that mere piece of philology? Such slavery does not exist, and never has existed within this Union. It never did exist within our territory—it never will exist—and it is not claimed by any one that it ought to be enforced or established. The slavery which exists within this Union, is such as to render hardly proper, in strictness of language, the term "owner," or the term "property." These words are not applicable to the person of the slave; and the phrase "chattel-slavery" is a mere cavil. Indeed, as used by anti slavery agitators, it is wholly false. The phrase was coined by weak or wicked men, in order to mislead the ignorant and to influence the unwary. The slavery which does exist in these United States, and which will exist as long as they are the United States, is a right in the master to the services of the slave, or servant, and that is all. Therefore this abhorred slavery that my learned friend reads about from

"Taylor on the Civil Law," under which the slave might be tortured and might be put to death—which cruelties might equally have been practised upon a child by the parent in former times—is a thing unknown in our law, or in our country. "Chattel-slavery" is a raw-head and bloody-bones, evoked to figure in speeches on the hustings. It is a phrase uttered for fraudulent purposes, and doubtless it has produced most pernicious results. It does not describe that negro slavery which George Washington sanctioned by his practice through life, and which, by his last Will and Testament, he authorized his wife to enforce as long as she should live; which is protected in the Constitution of the United States—that sacred charter which he and his illustrious compatriots bequeathed to us.

By a painfully elaborate train of abstruse reasoning, the learned counsel who last spoke, has proven to his own satisfaction, that a slave in the Southern States is a mere chattel, and therefore, that slavery as a social *status*, is shocking to humanity. He admits that the government will punish the master for extreme cruelty; but still he contends, that the social condition of slavery is intolerable and the slave is a mere chattel! Why is this? How does the counsel prove it?

He presents just two proofs. The first is, that according to the general principles of the common law, a slave has no personality, or indeed any recognition, and that every protection accorded him, comes from positive statutes. Well this is truly distressing! It certainly is calculated to wound refined and delicate sensibilities! How insecure the poor slave must feel when he reflects that if wounded or slain, the aggressor can only be indicted under a statute instead of being punished at common law. How gaily the murderer will swing off, knowing that his breath is to be stopped by a statutory and not a common-law noose. So much for proof number one. I might add that the murder of any man, black or white, long ago ceased to be punishable at common law, even in this State. The whole remedy is by statute. (2 Parker's Cr. Cases, 637. 3 Selden, 393. 13 Wend. 173.)

The counsel's second proof is, that the slave himself cannot, by a civil action in his own behalf, prosecute his master for cruelty or other personal wrong. Here is the same commixture and confusion of ethics and attorney's practice. Under that very common-law system—so much praised by all—such has ever been the universal condition of all married women. According to this argument, all our respected mothers were nothing but chattels! That good dear old nursing parent, the common law, would not permit any of them to hold or acquire any property or to maintain a civil action against their husbands for any grievance, however shocking, nor could a civil action be brought against anybody else for any wrong done to them, unless their husbands chose to bring the suit! On a little dissection, how farcical, how preposterous all these petty arguments appear!

All these pretences advanced to excuse our withholding the rites of hospitality from our fellow citizens of Virginia, are wholly without foundation in reason or justice.

In the opening, I invited my learned friends to refer to the Holy Bible, in case they chose in any form to invoke religious sentiment or Divine law. How have they met that challenge? The prevailing authority in this country, in relation to morality and such things spiritual as belong to us in this vale of tears, is the Bible. It is the authority by which my learned friend to whom I am now about to refer, is governed in his daily walk and conversation—much to his honor be it said. It is the authority which is taught throughout this land, as that which contains the knowledge of all things that are essential to salvation. All that is beyond and outside of it, is deemed superstitions and non-obligatory—built upon the mere traditions of times commonly called the dark ages. Now, to this great authority, I invited my learned friends to appeal, touching what is required or forbidden, in respect

to slavery, by God's law, or by natural justice. One of the learned counsel has approached the religious view, but he has not condescended to notice that invitation. He left his Bible at home this morning. And, pray what religious authority did he pick up and cite to your Honors in its stead? He has told you a most affecting story about the Catholic clergy. He has read to us that the Catholic clergy in former times, made themselves active in persuading the white man to loosen the shackles of bondage from his white and equal brother. If they did, they acted virtuously and are entitled to all the praise that can be awarded them. But is that the authority on which my learned friend and his pious coadjutors act in their persecution of our Southern fellow-citizens? If it be, I think it must strike every reasoning mind with some little astonishment, that citizens of the Northern States, following Catholicism in nothing else, should yet rely on its supposed teachings, as their sole authority for kindling the fires of political discord, and assailing the institutions, and guaranteed privileges of their countrymen at the South. But even this authority is misunderstood. I think we may fairly be permitted to say that they do not understand it. It is most certain that they do not believe it in anything else; and there is one very controlling proof that they do not understand it in this respect. That Church, so incurable in its alleged errors, so inflexible in its determinations, so unchangeable, so incapable of improvement, amendment, or reformation, takes no part whatever in the crusade against negro slavery. She leaves the doctrines and principles now imputed to her, if indeed they be hers, to be enforced by the most ultra of her opponents at the other extreme of our great religious platform.

Before this Honorable Court, it might have been somewhat in place to cite the Bible. I may without offence, say, that every member of it is attached to those forms of religious belief in which that book is looked upon as the sole guide of faith and moral conduct. Not one single member of it is capable of being influenced in religious matters by the teachings of the Catholic church.

So much for that argument. It is illegitimate, and unsound.

My learned friend who last addressed the Court, has also observed that this case was presented to your consideration on my part, with soft phrases and intricate sentences; that much had been said with a purpose to draw attention, or which had the effect of drawing attention away from the subject in hand, and that I had avoided a reference to general principles. I appeal confidently to your Honors' judgment whether my course in this argument has not been mainly a reference to general principles, and whether it has not been marked by a desire to avoid mere details. If it be true that I have fallen into the vice, or adopted the virtue—whichever it may be called—of using over-soft phrases, I ought surely to be forgiven, for it is my first offence. And as to intricate sentences, if I have offended in that way, it certainly verifies the saying, that a certain kind of communication has a certain effect upon manners. It is a new thing in my experience to be accused of uttering soft phrases, and as to the relative proportion of intricate sentences uttered in this debate, I think I can safely submit to a comparison. In that particular, at least, the learned counsel will be found to have far excelled. If the argument presented on our part in this case is remarkable for anything, it is for the simple point-blank directness with which it meets the emergency. On this head I confidently appeal to the closest scrutiny. Intricate sentences! My learned friend has not read a sentence from our brief, or pointed out a single intricacy. Our argument may be all wrong, but it is direct. It is unmistakeable in its import; it is easily understood. Whether it can be easily refuted, your Honors, or some authoritative tribunal will determine. I submit most respectfully that the leading desire exhibited on my part, here and elsewhere, has been to draw the mind of the courts and the intelligent mind of the American people, to the true question

which underlies this whole conflict—I mean that very question to which my friend who last spoke on the other side, has addressed the best and, in my judgment, the finest part of his very able argument. It is the point to which I mainly addressed myself in the opening, and on it I will now say a few words more:

My friend denounced the institution of negro slavery as a monstrous wrong, as a sin, as a violation of the law of God and of the law of man—of natural law and of natural justice; and, in the course of his argument, he called attention to the enormity of the results claimed in this case. He deprecated a reversal, because in that event these eight persons—and not only they, but their posterity to the remotest time, would be consigned to this shocking condition of abject bondage and slavery.

How very small and minute was that presentation of the subject! My friend must certainly have used the microscope, when, in seeking to present this question in a striking manner to your Honors' minds, he called attention to these few persons and their posterity. Our Territory contains nearly four millions of these human beings, who, by the laws and institutions existing in the Southern States, and, as every one admits, protected in those States by the Federal Constitution, are not only consigned to hopeless bondage throughout their whole lives, but so are their posterity to the remotest time. They have, since the Union was formed, multiplied greatly, and are still constantly increasing in numbers. It is not eight persons and their posterity, but four millions and their countless posterity, that are by the decision of the general question, to be enfranchised or consigned to bondage henceforth and forever. It is a question of the mightiest magnitude; I would not have it otherwise considered; and I wish your Honors to have the most vivid conception of its magnitude, when contemplating negro slavery in the very connection in which my learned friend has presented it.

He insists that holding these negroes in slavery is a sin, is a violation of natural justice, and contrary to the law of God; that it is defrauding the laborer of his wages, a sin that cries aloud to Heaven for vengeance; that it involves a course of unbridled rapine, fraud and plunder. If so, it is a monstrous wickedness, for by it these four millions of men and their posterity are to be thus unjustly and cruelly oppressed throughout all time.

Is it a sin? Is it an outrage against divine law and natural justice? That is the question. If it be a sin, then I must admit it to be a sin of the greatest magnitude—a sin of the most enormous and flagitious character that ever was presented for condemnation at the bar of justice. The man who deeming it sinful at all, does not shrink back from it with horror, is utterly unworthy of the name of man. It is no trivial offence, that may be tolerated with limitations and qualifications; that we can excuse ourselves for acquiescing in, because we have made a bargain to do so. The tongue of no human being is capable of depicting its enormity; it is not in the power of the human mind to form a just conception of its wickedness and cruelty. And what, I ask, is the rational and necessary consequence, if we regard it to be thus sinful, thus unjust, thus iniquitous?

Look at this question as American citizens—as members of this great republic. Consider it as patriots. I ask you what ought to be the effect if this system of slavery is sinful and unjust? There can be but one answer. Its existence under our government, supported by our jurisprudence, sustained by the fundamental law of the land—is a public and crying reproach against the whole nation.

If negro slavery be unjust, ought an honest, enlightened Frenchman or Englishman to entertain as a guest, or even to salute with a courteous recognition, one of these southern slaveholders? Certainly not. There would be no more propriety in his doing so than in one of our fair countrywomen, of pure life and morals, associating in public with one who was the most unworthy of her sex. There would be no more propriety in his doing so

than in one of your Honors associating with a highwayman or a pickpocket, merely because in the village of his residence there was a bad police, or no adequate law for his punishment. By asserting that slavery is thus sinful, we arraign our southern fellow-citizens at the bar of public opinion as totally unfit to associate with any honest European gentleman.

And I ask what have we to say on the subject, as to our own pious selves here at the North? Our southern neighbors having been brought up with this institution in their midst—having been taught that it was just and proper—might be allowed to plead the excuse of ignorance. They might, perhaps, be tolerated as not consciously wicked, but only benighted and in error. But what must be thought of the inhabitants of the Free States, who know that it is wicked, who say that it is wicked, who write upon their statute books in their supreme, sovereign capacity, that it is wicked, and who yet live under a constitution and compact by which they agree to support and sustain it to the full extent of whatever is written in that compact, and who, if any one of these unhappy victims should escape from the slavery to which he is consigned, and should fly hither for shelter, would seize and return him, or at least would permit his master to come hither, seize him, and carry him back into bondage?

I presented this question in the opening: I now repeat it. Certainly we have no excuse. We know that negro slavery is wicked and pernicious, if it be so, and yet we sit down and live under a constitution which compels its support to this extent. Nay more—we profess fidelity to that Constitution, and whenever one of us is elected to office under it, he is most happy to accept, and placing his hand upon the sacred volume, he unhesitatingly pledges himself in all things to support that Constitution.

A virtuous and enlightened European might excuse the benighted southerner; but if he has a sense of honor, if he has a sense of justice, if he has self-respect, he must turn his back with contempt upon the willfully offending northern man, as the vilest of the vile.

The patriot contemplates his country as a whole—as a unit, and feels himself honored in being enrolled among her citizens. Can he be a patriotic American who joins in the cry of Exeter Hall against his country's Constitution; who joins with a foreign adversary in denouncing it as a foul reproach to the name of humanity; as an outrage against common decency; a thing which exists in defiance of natural justice and the law of God? Surely not.

For our northern friends, who have fallen into this fatal delusion, we can only say, "Father, forgive them, for they know not what they do." This is all that can be said for them. Certainly the sentiment which animated the gallant Decatur in his memorable resolve to stand by his country in all controversies, "right or wrong," must be pretty effectually cast out from their bosoms, when Americans can be found ready to join in this outcry of the stranger, the rival and the hater. Can he be a patriot who joins with these, in pronouncing the Constitution of his country a league with iniquity, an instrument which, by its terms and letter, unjustly and cruelly holds in hopeless bondage millions of human beings who are well entitled to liberty?

It was said in the opening that no honest man could understandingly believe that negro slavery is thus wicked and unjust, and yet retain in his bosom the sentiment of fidelity to this Constitution. I now add, I see not how any man, having a just sentiment of patriotism, can join in this foreign outcry against the Constitution of his country and against the established and existing institutions of so large a portion of it as is formed by those States now holding slaves.

Looking to the law of God and its invincible obligations, to the principles of natural justice which are founded on His law; contemplating in its true light as an exalted and manly sentiment that patriotism which is ever ready to sacrifice for our country all things except justice and God's will—I see not how any honorable American can love his country or pretend to be a patriot

and yet join in this crusade against negro slavery—a crusade against his country's honor, peace and prosperity. Those who imagine themselves patriots, and yet thus strike at their country, do not act understandingly. This is their only excuse.

Negro slavery cannot be abolished. Since the foundation of this republic it has ever been a main pillar of our strength, an indispensable element of our growth and prosperity. It is now an integral part of our being as a nation. To eviscerate it by fraud or tear it out by violence, would be a national suicide.

To vindicate its essential justice and morality in all courts and places before men and nations, is the duty of every American citizen; and he who fails in this duty is false to his country, or acts as one without understanding.

To support their views and to excuse their course, anti-slavery advocates cite some illustrious names. Occasional remarks of Washington and of Jefferson, are quite frequently cited for these purposes. If these illustrious men could return to earth, re-assume mortality, and stand here at this day among us, living witnesses of the condition of our country—witnesses of its progress and its probable future—no rational man can believe that either of them would be willing to utter, in the sense in which they are understood on the other side, the expressions cited. If they were here amongst us, they would be found on the side of their country. They would, as they always did, advocate its protection as a whole; the maintenance of its prosperity, its permanency, its glory and its honor. They would not be found denouncing the American name, as covered with an undying stigma and inwrought with the perpetuation of injustice. They would not be found pronouncing the first sentence in the Constitution—that it was made to “establish justice”—a piece of hypocrisy and a falsehood. They would not be found maintaining that the phrases concerning human equality, found in the Declaration of Independence and in the constitution of Virginia, were intended to include negroes. Any man of common sense can see that these words were not so intended. The then existing state of facts and the practice of the men who wrote these words prove that they were not used in the sense now contended for. That clear deduction is fully elucidated in the Dred Scott case. We are there reminded of what cannot be denied, that the free white race established this Republic. They made their Declaration of Independence, their Constitution, and their laws, for themselves. They did not intend to invite hither the Asiatic Mohammedan with his seraglio and his dozen wives. They did not intend to invite hither the idolatrous Chinese, with his temples and his idols. They did not intend to declare that the African negroes were men, citizens, or inhabitants, in the political sense of these words. The men who held negro slaves, and who sustained the institution, could not have so intended. It is impossible to suppose that they could have so intended. And if my learned friends mean to insinuate that there were in the councils of the nation, at that time, some persons with the same conscientious scruples as themselves, who believed slavery to be wicked, and who artfully contrived to get these words inserted as an entering wedge whereby the institution might ultimately be rent in pieces, they present a sorry picture of their revolutionary sires. So to assert should be treated by them as a foul insult.

It is not in keeping with the dictates of conscience or of honor, stealthily to work into a compact an acknowledgment which the other party to the compact does not intend to make. It is unworthy so to do, even in the smallest, slightest, meanest little contract. Who shall dare to impute such conduct, or such motives to the worthy and honored fathers of the Revolution, who represented that part of the country where the greatest objection to negro slavery existed? So far as we find in history a spirit of opposition to negro slavery manifested by these men, it may well have been grounded in conceptions of expediency, or considerations concerning the relative

shares of political power which one or the other portion of the country ought to enjoy. But it never can be said, with safety to their honor, or to the honor of our country, that they believed negro slavery to be in itself wicked or unjust. I think they did not entertain that opinion. If they did, they erred grievously. They erred in point of morals; they erred in point of policy. They were short-sighted as the wisest of mortals often are. They did not comprehend that negro slavery was destined to continue; that the negro race was to increase in this country as it has increased; or that the onward progress, greatness and glory of this country actually depended on the continued existence of negro slavery in its warm climates. If they did intend to use the assertion of equality among men in the Declaration of Independence in a sense different from that in which it was accepted by their associates from the South, the intent involved a departure from the path of honor and rectitude. This alternative I never will adopt. Shame on the men among their descendants who will consent to adopt it!

Let not this argument be misinterpreted. I do not invoke patriotism to influence the passions or seduce the judgment. I invoke it as a noble stimulant to noble minds. My object is to arouse attention, to the end that honest men, through the influence of their own cautious deliberations, may be led forth from the captivity of error.

I would not that any man should prefer earth to heaven, or love his country better than his God. Woe to him who for any consideration of profit to himself, his country or his race, tramples on the dictates of natural justice, contemning the law and defying the power of God! How shall he stand the final judgment?

Who dare tempt to such depravity, or advocate such reckless folly?

By appealing to patriotism, I seek only to awaken attention. I would, by its aid and through its benign influences, give to every American citizen, ere it be too late, this admonition: Do not turn aside from the truth of history, the teachings of experience, the rational deductions of common sense, and, from a mere caprice, without moral necessity, inflict upon your country's material interests and her honor a fatal blow. Do not so act in your capacity as a citizen, that, if arraigned before the judgment-seat of practical wisdom, you could find no refuge from a traitor's doom except in the plea of insanity.

The decision of the Court of Appeals was announced at the March Term, 1860, *affirming the judgment of the Supreme Court.*

Opinions were delivered in favor of affirmance by JUDGE DENIO and MR. JUSTICE WRIGHT.

JUDGE DAVIES and JUSTICES BACON and WELLES concurred.

MR. JUSTICE CLERKE dissented from the judgment of the Court, and delivered an opinion in favor of the reversal of the judgment of the Supreme Court.

CH. JUDGE COMSTOCK dissented, without assigning reasons.

JUDGE SELDEN expressed no opinion.

The following are all the opinions delivered in full:

THE OPINION OF JUDGE DENIO.

DENIO, J.—The petition upon which the writ of Habeas Corpus was issued, states that the colored persons sought to be discharged from imprisonment were, on the preceding night, taken from the steamer City of Richmond, in the harbor of New York, and at the time of presenting the petition were

confined in a certain house in Carlisle street in that city. The writ is directed to the appellant, by the name of *Lemmings*, as the person having in charge the "eight colored persons lately taken from the steamer City of Richmond, and to the man in whose house in Carlisle street they are confined."

The return is made by Lemmon, the appellant, and the colored persons of which it speaks, and which are therein alleged to be slaves, and the property of Juliet Lemmon, as "the eight slaves or persons named in the said writ of Habeas Corpus." It alleges that they were taken out of the possession of Mrs. Lemmon while *in transitu* between Norfolk, in Virginia, and the State of Texas, and that both Virginia and Texas are slaveholding States; that she had no intention of bringing the slaves into this State to remain therein, or in any manner except on their transit as aforesaid through the Port of New York; that she was compelled by necessity to touch or land, but did not intend to remain longer than necessary, and that such landing was for the purpose of passage and transit, and not otherwise, and that she did not intend to sell the slaves. It is also stated that she was compelled by *necessity or accident* to take passage from Norfolk in the above mentioned steamship, and that Texas was the ultimate place of destination.

I understand the effect of these statements to be that Mrs. Lemmon, being the owner of these slaves, desired to take them from her residence in Norfolk, in Virginia, to the State of Texas; and, as a means of effecting that purpose, she embarked, in the steamship mentioned, for New York, with a view to secure a passage from thence to the place of destination. As nothing is said of any stress of weather, and no marine casualty is mentioned, the necessity of landing, which is spoken of, refers no doubt to the exigency of that mode of prosecuting her journey.

If the ship in which she arrived was not bound for the Gulf of Mexico, she would probably be under the necessity of landing at New York to reëmbark in some other vessel sailing for that part of the United States; and this, I suppose, is what it was intended to state. The necessity or accident which is mentioned as having compelled her to embark at Norfolk in the city of Richmond, is understood to refer to some circumstance which prevented her from making a direct voyage from Virginia to Texas. The question to be decided is whether the bringing the slaves into this State under these circumstances, entitled them to their freedom.

The intention and the effect of the Statutes of this State bearing upon the point are very plain and unequivocal. By an act passed in 1817, it was declared that no person held as a slave should be imported, introduced or brought into this State on any pretence whatever, except in the cases afterwards mentioned in the act, and any slave brought here contrary to the act was declared to be free. Among the exceptional cases was that of a person not an inhabitant of the State passing through it, who was allowed to bring his slaves with him; but they were not to remain in the State longer than nine months, (Laws 1817, ch. 147, §§ 9, 15.) The portions of this act which concern the present question were reënacted at the revision of the laws in 1830. The first and last sections of the title are in the following language:

"SEC. 1. No person held as a slave shall be imported, introduced or brought into this State on any pretence whatsoever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free.

"SEC. 16. Every person born in this State, whether white or colored, is free. Every person who shall hereafter be born within this State shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free." (R. S. part 1, ch. 20, title 7.)

The intermediate sections, three to seven, inclusive, contain the exceptions. Section six is as follows: "Any person, not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may

bring with him any person lawfully held in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months; if such residence be continued beyond that time, such person shall be free." In the year 1841, the Legislature repealed this section, together with the four containing other exceptions to the general provisions above mentioned. (Ch. 247.)

The effect of this repeal was to render the first and sixteenth sections absolute and unqualified. If any doubt of this could be entertained upon the perusal of the part of the title left unrepealed, the rules of construction would oblige us to look at the repealed portions in order to ascertain the sense of the residue. (*Bassey vs. Story*, 4 Bain & Adolph, 98.) Thus examined, the meaning of the statutes is as plain as though the Legislature had declared in terms that if any person should introduce a slave into this State, in the course of a journey to or from it, or in passing through it, the slave shall be free.

If, therefore, the Legislature had the constitutional power to enact this statute, the law of the State precisely meets the case of the persons who were brought before the judge on the writ of Habeas Corpus, and his order discharging them from constraint was unquestionably correct. Every Sovereign State has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction to exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another.

Each State has, moreover, the right to enact such rules as it may see fit respecting the title to property, and to declare what subject shall, within the State, possess the attributes of property, and what shall be incapable of a proprietary right. These powers may of course be variously limited or modified by its own constitutional or fundamental laws; but independently of such restraints (some are alleged to exist affecting this case), the legislative authority of the State upon these subjects is without limit or control, except so far as the State has voluntarily abridged her jurisdiction by arrangements with other States. There are many cases where, it is true, the conditions impressed upon persons and property by the laws of other friendly States, may and ought to be recognized within our own jurisdiction.

These are defined, in the absence of express legislation, by the general assent and by the practice and usage of civilized countries, and being considered as incorporated into the municipal law, are freely administered by the Courts. They are not, however, thus allowed on account of any supposed power residing in another State to enact laws which should be binding on our tribunals, but from the presumed assent of the law-making power, to abide by the usages of other civilized States. Hence, it follows that where the Legislature of the State, in which a right or privilege is claimed on the ground of comity, has by its laws spoken upon the subject of the alleged right, the tribunals are not at liberty to search for the rule of decision among the doctrines of international comity, but are bound to adopt the directions laid down by the political government of their own State.

We have not therefore considered it necessary to inquire whether by the law of nations, a country where negro slavery is established has generally a right to claim of a neighboring State, in which it is not allowed, the right to have that species of property recognized and protected in the course of a lawful journey taken by the owner through the last mentioned country, as would undoubtedly be the case with a subject recognized as property everywhere; and it is proper to say that the counsel for the appellant has not urged that principle in support of the claim of Mrs. Lemmon.

What has been said as to the right of a Sovereign State to determine the *status* of persons within its jurisdiction applies to the States of this Union, except as it has been modified or restrained by the Constitution of the United States (*Grover vs. Slemaster*, 15 Pet. 449; *Moore vs. The People of Illinois*,

14 How. B.; *City of New York vs. Milne*, 11 Pet. 131, 139.) There are undoubted reasons independently of the provisions of the Federal Constitution in conciliatory legislation on the part of the several States toward the polity, institutions and interests of each other, of a much more persuasive character than those which prevail between the most friendly States that are unconnected by any political union; but these are addressed exclusively to the political power of the respective States, so that whatever opinion we may entertain as to the reasonableness or polity, or even of the moral obligation of the non-slaveholding States to establish provisions similar to those which have been stricken out of the Revised Statutes, it is not in our power while administering the laws of the State in one of its tribunals of justice, to act at all upon those sentiments, when we see, as we cannot fail to do, that the Legislature has deliberately rejected them.

The power which has been mentioned as residing in the States, is assumed by the Constitution itself to extend to persons held as slaves by such of the States as allow the condition of slaves, and to apply, also, to a slave in the territory of another State which did not allow slavery, unaccompanied with an intention on the part of the owner to hold him in a state of slavery in such other State. The provision respecting the return of fugitives from service, contains a very strong implication to that effect. It declares that no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, etc. There was at least one State, which, at the adoption of the Constitution, did not tolerate slavery; and in several of the other States the number of slaves was so small, and the prevailing sentiment in favor of emancipation so strong, that it was morally certain that slavery would be speedily abolished. It was assumed by the authors of the Constitution, that the fact of a federative Union would not, of itself, create a duty on the part of the States which should abolish slavery to respect the rights of the owners of slaves escaping thence from the States where it continued to exist.

The apprehension was not that the States would establish rules or regulations, looking primarily to the emancipation of the fugitives from labor, but that the abolition of slavery in any State would draw after it the principle that a person held in slavery would immediately become free on arriving, in any manner, within the limits of such State. That principle had then recently been acted upon in England in a case of great notoriety, which could not fail to be well known to the cultivated and intelligent men who were the principal actors in framing the Federal Constitution.

A Virginia gentleman of the name of Stewart had occasion to make a voyage from his home in that colony to England, on his own affairs, with the intention of returning as soon as they were transacted; and he took with him as his personal servant his negro slave, Somerset, whom he had purchased in Virginia, and was entitled to hold in a state of slavery by the laws prevailing there. While they were in London, the negro absconded from the service of his master, but was retaken and put on board a vessel lying in the Thames bound to Jamaica, where slavery also prevailed, for the purpose of being there sold as a slave.

On application to Lord Mansfield, Chief Justice of the King's Bench, a writ of Habeas Corpus was issued to Knowles, as master of the vessel, whose return to the writ disclosed the foregoing facts. Lord Mansfield referred the case to the decision of the Court of King's Bench, where it was held, by the unanimous opinion of the Judges, that the restraint was illegal, and the negro was discharged. (*The Negro case*, 11 Hargrave's State Trials, 340; *Somerset agt. Stewart*, Lofft's Rep. 1.) It was the opinion of the Court that a state of slavery could not exist except by force of positive law, and, it being considered that there was no law to uphold it in England, the principles of the law respecting the writ of Habeas Corpus immediately applied them-

selves to the case, and it became impossible to continue the imprisonment of the negro.

The case was decided in 1772, and from that time it became a maxim that slaves could not exist in England. The idea was reiterated in the popular literature of the language, and fixed in the public mind by a striking metaphor, which attributed to the atmosphere of the British Islands a quality which caused the shackles of a slave to fall off. The laws of England respecting personal rights were, in general, the laws of the Colonies, and they continued the same system after the Revolution by provisions in their Constitutions, adopting the common law, subject to alterations by their own statutes. The literature of the Colonies was that of the mother country.

The aspect in which the case of fugitive slaves was presented to the authors of the Constitution, therefore, was this: A number of the States had very little interest in continuing the institution of Slavery, and were likely soon to abolish it within their limits. When they should do so, the principle of the laws of England as to personal rights, and the remedies for illegal imprisonment, would immediately prevail in such States. The judgment in *Somerset's case*, and other principles announced by Lord Mansfield, were standing admonitions that even a temporary restraint of personal liberty by virtue of a title derived under the laws of slavery, could not be sustained where that institution did not exist by positive law, and where the remedy by Habeas Corpus, which was a cherished institution of this country, as well as in England, was established.

Reading the provision for the rendition of fugitive slaves in the light which these considerations offered, it is impossible not to perceive that the Convention assumed the general principle to be, that the escape of a slave from a State in which he was lawfully held to service into one which had abolished slavery, would, *ipso facto*, transform him into a free man. This was recognized as the legal consequence of a slave going into a State where slavery did not exist, even though it were without the consent and against the will of the owner. *A fortiori*, he would be free if the master voluntarily brought him into a Free State for any purpose of his own. But the provision in the Constitution extended no further than the case of the fugitive.

As to some cases, the admitted general consequences of the presence of a slave in a Free State was not to prevail, but he was, by an express provision of the Federal compact, to be returned to the party to whom the service was due. Other cases were left to be governed by the general laws applicable to them. This was not unreasonable, as the owner was free to determine whether he would voluntarily permit his slave to go within a jurisdiction which did not allow him to be held in bondage. That was within his own power, but he could not always prevent his slaves from escaping out of the State, in which their servile condition was recognized. The provision was precisely suited to the exigency of the case, and it went no further.

In examining other arrangements of the Constitution apparently inserted for purposes having no reference to slavery, we ought to bear in mind that when framing the fugitive slave provision, the Convention was contemplating the future existence of States which should have abolished slavery, in a political union with other States where the institution would still remain in force. It would naturally be supposed, that if there were other cases in which the rights of slave-owners ought to be protected in the States which should abolish slavery, they would be adjusted in connection with the provision looking specially to that case, instead of being left to be adjusted from clauses intended, primarily, for cases to which slaves had no necessary relation. It has been decided, that the fugitive clause does not extend beyond the case of the actual escape of a slave from one State to another. (Ex parte Simmons, 4 Wash. C. C. R. 396.) But the provision is plainly so limited by its own language.

The Constitution declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. (Art. 4, § 2.) No provision in that instrument has so strongly tended to constitute the citizens of the United States *one people* as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation, the British colonies on this continent had no political connection, except that they were severally dependencies on the British Crown. Their relation to each other was the same which they respectively bore to the other English colonies, whether in Europe or Asia.

When, in consequence of the Revolution, they severally became independent and sovereign States, the citizens of each State would have been under all the disabilities of alienage in every other, but for a provision in the compact into which they entered, whereby that consequence was avoided. The articles adopted during the Revolution, formed a friendly league for mutual protection against external force, but in framing them it was felt to be necessary to secure a community of intercourse, which would not necessarily obtain, even among closely allied States. This was effected by the fourth article of that instrument, which declared that the free inhabitants of each of the States (paupers, vagabonds, and fugitives from justice excepted), should be entitled to all privileges and immunities of free citizens in the several States, and that the people of each State should have free ingress and regress to and from any other State, and should enjoy therein, all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof, respectively.

The Constitution organized a still more intimate Union, constituting the States, for all external purposes and for certain enumerated domestic objects, a single nation; but still, the principle of State Sovereignty was retained as to all subjects, except such as were embraced in the delegations of power to the General Government, or prohibited to the States. The social *status* of the people, and their natural and relative rights, as respects each other, the definitions and arrangements of property, were among the reserved powers of the States. The provision conferring rights of citizenship upon the citizens of every State in every other State, was inserted substantially as it stood in the articles of confederation.

The question now to be considered is, how far the State jurisdiction over the subjects just mentioned, is restricted by the provision we are considering, or, to come at once to the precise point in controversy, whether it obliges the State Governments to recognize, in any way, within their own jurisdiction, the property in slaves, which the citizens of States, in which slavery prevails, may lawfully claim within their own States, beyond the case of fugitive slaves. The language is that they shall have the privileges and immunities of citizens in the several States. In my opinion, the meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities, that is, the same rights, which the citizens of that State possess.

In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation, which should place them in a worse situation than a proper citizen of the particular State, would be unlawful. But the clause has nothing to do with the distinctions founded on domicile. A citizen of Virginia, having his home in that State, and never having been within the State of New York, has the same rights under our laws which a native-born citizen, domiciled elsewhere, would have, and no other. Either can be the proprietor of property here, but neither could claim any rights, which, under our laws, belong only to residents of the State.

But where the laws of the several States differ, a citizen of one State

asserting rights in another, must claim them according to the laws of the last mentioned State, not according to those which attain in his own. The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, imaginary policies of insurance, bargains for more than seven per cent. per annum of interest, and many others, void. In other States, such contracts, or some of them, may be lawful.

But no one would contend, that if made within this State, by a citizen of another State, they would be enforced in our Courts. Certain of them, if made in another State, in conformity with the laws there, would be executed by our tribunals, upon the principles of comity; and the case would be the same if they were made in Europe, or in any other foreign country. The clause has nothing to do with the doctrine of international comity. That doctrine, as has been remarked, depends upon the usage of civilized nations, and the presumed assent of the legislative authority of the particular State in which the right is claimed; and an express denial of the right by that authority is decisive against the claim. How, then, is the case of the appellant aided by the provision under consideration?

The Legislature has declared, in effect, that no person shall bring a slave into this State, even in the course of a journey between two slaveholding States, and if he does, the slave shall be free. Our own citizens are of course bound by this regulation. If the owner of these slaves is not in like manner bound, it is because, in her quality of citizen of another State, she has rights superior to those of any citizen of New York, and because, in coming here, or sending her slaves here for a temporary purpose, she has brought with her or sent with them the laws of Virginia, and is entitled to have those laws enforced in the Courts, notwithstanding the mandate of our own laws to the contrary. But the position of the appellant proves too much.

The privileges and immunities secured to the citizen of each State by the Constitution are not limited to time, or by the purpose for which in a particular case they may be desired, but are permanent and absolute in their character. Hence, if the appellant can claim exemption from the operation of the statute on which the respondent relies, on the ground that she is a citizen of a State where slavery is allowed, and that our Courts are obliged to respect the title which those laws confer, she may retain the slaves here during her pleasure; and as one of the chief attributes of property is the power to use it, or to sell or dispose of it, I do not see how she could be debarred of these rights within our jurisdiction as long as she may choose to exercise them.

She could not, perhaps, sell them to a citizen of New York, who would at all events be bound by our laws; but any other citizen of a Slave State who would equally bring with him the immunities and privileges of his own State, might lawfully traffic in her slave property. But my opinion is, that she has no more right to the protection of this property than one of the citizens of this State would have upon bringing them here, under the same circumstances, and that the clause of the Constitution referred to has no application to the case. I concede that this clause gives to citizens of each State entire freedom of intercourse with every other State, and that any law which should attempt to deny them free ingress or egress would be void. But it is citizens only who possess these rights, and slaves certainly are not citizens.

Even free negroes, as is well known, have been adjudged not to possess that quality. In *Moore vs. The State of Illinois*, already referred to, the Supreme Court of the United States, in its published opinion, declared that the States retained the power to forbid the introduction into their territory of paupers, criminals or fugitive slaves. The case was a conviction under a

statute of Illinois, making it penal to harbor or secrete any negro, mulatto or person of color, being a slave or servant owing service or labor to any other person. The indictment was for secreting a fugitive slave who had fled from his owner in Missouri.

The owners had not intervened to claim him, so as to bring the fugitive law into operation, and the case was placed by the Court on the ground that it was within the legitimate power of State legislation, in the promotion of its policy, to exclude an unacceptable population. I do not at all doubt the right to exclude a slave, as I do not consider him embraced under the provision securing a common citizenship; but it does not seem to me clear that one who is truly a citizen of another State can be thus excluded, though he may be a pauper or a criminal, unless he be a fugitive from justice. The fourth article of the Confederation contains an exception to the provision for a common citizenship, excluding from its benefits paupers and vagabonds as well as fugitives from justice; but this exception was omitted in the corresponding provision of the Constitution.

If a slave attempting to come into a State of his own accord can be excluded on the ground mentioned, namely, because as a slave he is an unacceptable inhabitant—and it is very clear he may be—it would seem to follow that he might be expelled if accompanied by his master. It might, it is true, be less mischievous to permit the residence of such a person when under the restraint of his owner; but of this the Legislature must judge. But it is not the right of the slave, but of the master, which is supposed to be protected under the clause respecting citizenship. The answer to the claim in that aspect has been already given. It is that the owner cannot lawfully do anything which our laws do not permit to be done by one of our own citizens, and as a citizen of this State cannot bring a slave within its limits except on the condition that he shall immediately become free, the owner of these slaves could not do it without involving himself in the same consequences.

It remains to consider the effect upon this case of the provisions by which the power is given to Congress to regulate commerce among the several States. (Art. 1, § 8, ¶ 3.) If the slaves had been passing through the navigable waters of this State in a vessel having a coasting license granted under the act of Congress regulating the coasting trade, in the course of a voyage between two Slave States, and in that situation had been interrupted by the operation of the writ of Habeas Corpus, I am not prepared to say that they could have been discharged under the provisions of the statute. So if in the course of such a voyage they had been landed on the territory of the State in consequence of a marine accident or stress of weather.

In either case they would, in strictness of language, have been introduced and brought into the State. In the latter case, their being here being involuntary, they would not have been *brought here* in the meaning of the statute. (See the case of the brig Enterprise, in the decisions of the Commission of Claims, under the Convention of 1853, p. 187.) But the case does not present either of these features. Its actual circumstances are these: Mrs. Lemmon, being the owner of these slaves at her residence in Norfolk, in Virginia, chose to take them to the State of Texas for a purpose not disclosed, further than that it was not in order to sell them.

Geographically, New York is not on the route of such a voyage, but we can readily see that it would be convenient to bring them to that city from which vessels sail to most of the ports of the Union, to be embarked from thence in a ship bound to a port in the extreme southern part of the Union. This was what was actually done. She came with the negroes to New York by sea, in order to embark thence to Texas; and when the writ of Habeas Corpus was served, they were staying at a house in the city, ready to set out when a vessel should sail, and not intending to remain longer than should be necessary.

The act under consideration is not in any just sense a regulation of com-

merce. It does not suggest to me the idea that it has any connection with that subject. It would have an extensive operation altogether independent of commerce. It is not, therefore, within the scope of the decision of the Supreme Court in the Passenger cases. (7 Howard, 283.) In these cases the States of New York and Massachusetts had imposed taxes upon passengers arriving by sea at the ports of those States. The Court, considering the carrying of passengers coming here from foreign countries as being transported by sea between ports in different States, to be an operation of foreign and inter-State commerce, and holding moreover that the power to regulate commerce was *exclusively* vested in Congress, declared these acts to be a violation of the Constitution of the United States.

It may be considered as settled by those judgments that an act of State legislation, acting directly upon the subject of foreign or inter-State commerce, and being in substance a regulation of that subject, would be unwarranted, whether its provisions were hostile to any particular act of Congress or not. But there is a class of cases which may incidentally affect the subject of commerce, but in respect to which the States are held fast until the ground has been covered by an act of Congress. State legislation on these subjects is not hostile to the power residing in Congress to regulate commerce; but if Congress, in the execution of that power, shall have enacted special regulations touching the particular subject, such regulations then become exclusive of all interference on the part of the States. This is shown by the case of *Wilson vs. The Black Canal Co.* (2 Peters, 250.) The State of Delaware had authorized a corporation to erect a dam across a creek below tide-water, in order to drain a marsh. The validity of the act was drawn in question on the ground that it was in conflict with the power of Congress to regulate commerce. The object of the improvement authorized by the State law was to improve the health of the neighborhood. In giving the opinion of the Court, Chief Justice Marshall observed that "means to produce these objects (that is, health and the like), provided they do not come in collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the Government of Delaware and its citizens, with which this Court can take no cognizance." "If Congress had passed any act which bore upon the case—any act in execution of the powers to regulate commerce, the object of which was to control State legislation over these navigable creeks over which the tide flows—we feel not much difficulty in saying that a State law being in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware with the Constitution is placed entirely on its repugnancy with the power to regulate commerce with foreign nations and among the several States—a power which has not been exercised so as to affect the question." The same principle had been affirmed in *Sturges vs. Crowninshield* (4 Wheat. 193), and in *Moore vs. Houston* (5 Wheat. 1); and since the Passenger cases it has been again reiterated in the Pilot case, *Cooley vs. the Board of Wardens of Philadelphia* (12 How. 299). The application of the rule to the present case is plain. We will concede, for the purpose of the argument, that the transportation of slaves from one slaveholding State to another is an act of international State commerce, which may be legally protected and regulated by Federal legislation. Acts have been passed to regulate the coasting trade, so that if these slaves had been *in transitu* between Virginia and Texas, in a coasting vessel, at the time the Habeas Corpus was served, they could not have been interfered with while passing through the navigable waters of a Free State by the authority of a law of such State. But they were not thus *in transitu* at that time.

Congress has not passed any act to regulate commerce between the States

when carried on by land, or otherwise than in coasting vessels. But conceding that, in order to facilitate commerce among the States, Congress has power to provide for precisely such a case as the present—the case of persons whose transportation is the subject of commercial intercourse, being carried by a coasting vessel to a convenient port in another State, with a view of being there landed, for the purpose of being again embarked on a fresh coasting voyage to a third port, which was to be their final destination.

The unexercised power to enact such a law, to regulate such a transit, would not affect the power of the States to deal with a *status* of all persons within their Territory in the meantime, and before the existence of such a law. It would be a law to regulate Commerce carried on partly by land and partly by water—a subject upon which Congress has not thought proper to act at all. Should it do so hereafter it might limit and curtail the authority of the State to execute such an act as the present in a case in which it should interfere with such paramount legislation of Congress. I repeat the remark that the law of the State under consideration has no aspect which refers directly to commerce among the States. It would have a large and important operation upon cases falling within its provisions, and having no connection with any commercial enterprise. It is, then, so far as the commercial clause is concerned, generally valid; but in the case of supposable Federal legislation, under the power conferred upon Congress to regulate commerce, circumstances might arise where its execution, by freeing a slave cargo landed on our shores, in the course of an inter-State voyage, would interfere with the provisions of an act of Congress.

The present state of Federal legislation, however, does not, in my opinion, raise any conflict between it and the laws of this State under consideration. Upon the whole case I have come to the conclusion that there is nothing in the National Constitution or the laws of Congress to preclude the State judicial authorities from declaring these slaves, thus introduced into the territory of this State, free, and setting them at liberty, according to the directions of the Statutes referred to.

For the foregoing reasons, I am in favor of confirming the judgment of the Supreme Court.

MR. JUSTICE WRIGHT delivered the following concurring opinion :

OPINION OF MR. JUSTICE WRIGHT.

No person can be restrained of his liberty within this State, unless legal cause be shown for such restraint. The Habeas Corpus act operates to remove the subject from private force into the public forum; and enlargement of liberty, unless some cause in law be shown to the contrary, flows from the writ by a legal necessity. (Con. Art. 1, § 4; 2 R. S. 563, § 21; do, 565, § 39). The restraint cannot be continued for any moment of time unless the authority to maintain it have the force of law within the State.

In November, 1852, a writ of Habeas Corpus on behalf of eight colored persons, was issued by a Justice of the Superior Court in the city of New York, to inquire into the cause of their detention. The appellant showed for cause that they were the slaves of his wife, in Virginia, of which State before that time he and his wife had been citizens and there domiciled, and that she held them as such in New York, in transit from Virginia through New York, to Texas, where they intended to establish a new domicile. The return to the writ stated substantially that the route and mode of travel was by steamer from Norfolk, in Virginia, to the port of New York, and thence by a new voyage to Texas. In execution of this plan of travel, they and their slaves had reached the city of New York, and were awaiting the opportunity of a voyage to Texas, with no intention on their part that they or the eight colored persons should remain in New York for any other time, or for any other purpose, than until opportunity should present to take

passage for all to Texas. The whole question, therefore, on these facts is, whether the cause shown was a legal one. If the relation of slave-owner and slave which subsisted in Virginia between Mrs. Lemmon and these colored persons while there, by force of law, attend upon them while commorant within this State in the course of travel from Virginia to Texas; and New York, though a sovereign State, be compelled to sanction and maintain the condition of slavery for any purpose, and cannot effect a universal proscription and prohibition of it within her territorial limits, then is legal cause of restraint shown; otherwise not.

The question is one affecting the State in her sovereignty. As a sovereign State she may determine and regulate the *status* or social and civil condition of her citizens, and every description of persons within her territory. This power she possesses exclusively; and when she has declared or expressed her will in this respect, no authority or power from without can rightly interfere, except in the single instance of a slave escaping from a State of the Union into her territory; and in this, only because she has, by compact, yielded her right of sovereignty. (U. S. Con., Art. 4, § 2.) She has the undoubted right to forbid the *status* of slavery to exist in any form, or for any time, or for any purpose, within her borders, and declare that aslave brought into her territory from a foreign State, under any pretence whatever, shall be free. If she has done this, then neither an African negro nor any other person, white or black, can be held within her limits, for any moment of time, in a condition of bondage. It cannot affect the question, that at some time in her history as a Colony or State, she has tolerated slavery on her soil, or that the *status* has even had a legal cognition; for without regard to time or circumstances, the State may, at her will, change the civil condition of her inhabitants and her domestic policy, and proscribe and prohibit that which had before existed. I do not say that she may convert any description of her free inhabitants or citizens into slaves; for slavery is repugnant to natural justice and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government. Besides, liberty is the natural condition of men, and is world-wide; while slavery in local, and beginning in physical force, can only be supported and sustained by positive law, "Slavery," says Montesquieu, "not only violates the laws of nature and of civil society, it also wounds the best forms of government in a democracy where all men are equal. Slavery is contrary to the spirit of the Constitution."

It is not denied that New York has effectually exerted her sovereignty to the extent that the relation of slave-owner and slave cannot be maintained by her citizens, or persons or citizens of any other State or nation domiciled within her territory, or who make any stay beyond the reasonable halt of wayfarers, and that she might rightfully do. I will not stop here to inquire whether this is not virtually conceding the whole question in the case. It is urged that this is as far as the State had gone when the present case arose; and, if I comprehend the argument rightly, as far as she can ever go without transcending restraints imposed upon her sovereignty by the Constitution of the United States, or violating the principles of the law of Nations as governing the intercourse of friendly States. I shall show that neither of these propositions are maintainable, and that in the legislation of the State on the subject of slavery, the case of the *status* during transit, has not escaped its intent and effect; but that if it were otherwise, when the domestic laws reject and suppress the *status* as a civil condition or a social relation, as matter of reason and authority, it is never upheld in the case of strangers resident or in transit.

1st. How far has the State gone in the expression of her sovereign will, that slavery, by whatsoever transient stay, shall not be tolerated upon her soil? When negro slavery was first introduced and established as an institution in the Colony of New York, is not easily traceable. It never had any foundation in the law of nature, and was not recognized by the common

law. (Sommersett's case, Loff's Rep. 1; S. C. 20; Howell's State Trials, 2.) Yet it existed in the Colony by force of local law, and was continued by the same sanction in a mild form in the eastern part of the State, after New York became an independent sovereignty. The public sentiment, reason and conscience, however, continued to frown on it until, in 1817, steps were taken by the legislative department of the Government to effect its total abolition before 1830. As indicative of the public sentiment, in 1820 the legislature, with unanimity, adopted a resolution requesting our representatives in Congress to oppose the admission of any State into the Union, without making the prohibition of slavery therein an indispensable condition of admission; and in the preamble to the resolution, recited, that they considered slavery to be an evil much to be deplored. The Statute of 1817 provided against importing, introducing or bringing into the State on any pretence whatever, except in certain cases therein specified, persons held as slaves under the laws of other States. Amongst these cases was that of a person, not being an inhabitant of our State, who should be travelling to or from, or passing through the State. He might bring with him any person held by him in slavery under the laws of the State. He might bring with him any person held by him in slavery under the laws of the State from which he came, and might take such person with him from the State of New York; but the person held in slavery should not reside or continue in our State more than nine months, and if such residence were continued beyond that time, such person should be free. These provisions against introducing or bringing foreign slaves into the State, except in the case of an inhabitant of another State temporarily sojourning in or passing through this State, were reenacted in the revision of the Statutes in 1830, with this additional section: "Every person born within this State, whether white or colored, is free; every person who shall hereafter be born within this State, shall be free, and every person brought into this State as a slave, except as authorized by this title, shall be free." (1 R. S., 656, 657, § 6; do. 659, § 16.) Here was an authoritative and emphatic declaration of the sovereign will, that freedom should be the only condition of all descriptions of persons, resident or domiciled within the State, and that no slave should be brought therein, under any pretence whatever, except by his master, an inhabitant of another State, who was travelling to or from, or passing through this State. Thus slavery was left without the support of even the municipal law, except in the instance of sojourners, and then only for a period of nine months, and slave-owners of other States passing with their slaves through our own. But, in 1841, even the sanction of the municipal law in these cases, was taken away. The Legislature, in 1841, repealed all the sections of the Revised Statutes allowing slaves to be brought voluntarily into the State, under any circumstances, leaving the provisions still in operation, that no person held as a slave should be imported, introduced or brought into the State on any pretence whatever; and if brought in, should be free. (Laws of 1841, chap. 247.) That this legislation was intended to reach the case of the *transitus* of the slave in custody of an inhabitant of a slave-holding State, is evident. By the law of 1830, the privilege was secured to the foreign slaveholder of temporarily sojourning in or passing through the States with his slaves. In 1841 this privilege is taken away by the affirmative action of the law-making power. So, also, by the law of 1840, any person who, or whose family resided part of the year in this State, and part of the year in any other State, might remove or bring with him or them, from time to time, any person lawfully held by him in slavery, into this State, and might carry such person with him or them out of it. This was denied by the Legislature in 1841. The obvious intent and effect of the repealing act of 1841, was to declare every person upon the soil of this State, even though he may have been held as a slave by the laws of another State, to be free; except in the single instance of a person held in slavery in any State of the United States under the laws thereof, who should escape into

this State. With the courtesy of this legislation, so far as it might operate to effect friendly intercourse with citizens of slaveholding States, as a judicial tribunal, we have nothing to do. We are only to determine the intent and effect of the legislation. It is but just, however, to the political power of the State, to remark that it was not conceived in any spirit of irrational propagandism or partisanship, but to effectuate a policy based upon principle, and in accordance with public sentiment. The fact that it has been the law of the State for nearly twenty years, and through successive changes of the political power, is cogent proof that it rests upon the foundation of a public sentiment not limited in extent to any party or faction. The effect of the legislation was to render the civil condition of slavery impossible in our own society. Liberty and slavery, as civil conditions, mean no more than the establishment of law, and the means to enforce or protect the one or the other. As the *status* of slavery is sustained and supported exclusively by positive law, (and this has been so held as to the *status* in Virginia by her Courts), if we have no law to uphold it, but, on the contrary, proscribe and prohibit it, it cannot exist for an instant of time within our jurisdiction. (4 Mumford's Rep. 209; 2 Hen. & Mumford, 149.) Of course I mean with this qualification, that there is no duty or obligation in respect thereto, imposed on the sovereignty of the State by the Federal Constitution, or the rules of international law.

2d. Is there anything in the Federal Constitution to hinder the State from pursuing her own policy in regulating the social and civil condition of every description of persons that are or may come within her jurisdictional limits, or that enjoins on her the duty of maintaining the *status* of slavery in the case of slaves from another State of the Union, voluntarily brought into her territory? It ought not to be necessary at this day to affirm the doctrine, that the Federal Constitution has no concern, nor was it designed to have, with the social basis and relations and civil conditions which obtain within the several States. The Federal Constitution is but the compact of the people of separate and independent sovereignties, yielding none of the rights pertaining to those sovereignties within their respective territorial limits, except in a few special cases. This was the nature of the compact as explained by its framers and contemporaneous expounders, and since by the Federal Courts, although it has become common of late to strive to find something in this bond of Federal Union to sustain and uphold a particular social relation and condition outside of the range of the laws which give it vitality. (*Ex parte Simmons*, 4 Wash. C. C. Rep. 336; *Groves vs. Slaughter*, 15 Peters, 508; *Prigg vs. Commonwealth of Penn.*, 16 Peters, 611, 625; *Strader vs. Graham*, 10 Howard, R. 82, 93.) Although the *status* of African Slavery had at some time been recognized in all of the original States, at the period of the formation of the Federal Constitution, some of them had abolished the institution, and others were on the eve of abolishing it; whilst others were maintaining it, with increasing vigor. There are but three sections in the whole instrument that allude to the existence of slavery under the laws of any of the States, and then not in terms, but as explained by the light of contemporaneous history, and in such a way as to stamp the institution as local. These are the provisions apportioning Federal representation and direct taxation, (U. S. Con., art. 1 § 2, sub. 3,) in relation to "persons held to labor in one State, under the laws thereof, escaping into another," (Con., art. 4, § 2), and restraining Congress, prior to 1808, from prohibiting "the migration or importation of such persons as any of the States now existing, shall think proper to admit," (Con., art. 1, § 9.)

The latter provision, it is known, was urged with much earnestness by the delegates from two or three of the Southern States, with the view to restrain Congress from prohibiting the foreign slave trade before 1808. In *Grover vs. Slaughter*, 15 Peters, 506, Judge McLean thought the provision recognized the power to be in the States to admit or prohibit at the discretion of each State, the introduction of slaves into her territory. He says :

"The importation of certain persons, (meaning slaves), which was not to be prohibited before 1808, was limited to such States then existing, as shall think proper to admit them. Some of the States at that time prohibited the admission of slaves, and their right to do so was as strongly implied by this provision as the right of other States that admitted them." But the provision has long ceased to have any practical operation. Congress has prohibited the importation of slaves into any of the States of the Union, and the slave trade is declared to be piracy. The provision has no importance now, except it be to show, that in the view of the framers of the Constitution, slavery was local in its character, that the power over it belonged to the States respectively, and that it was not to be recognized or receive any aid from Federal authority, but on the contrary, by all the means it possessed, Federal power, after 1808, was to be exerted to suppress it. The provision in respect to apportioning representation in Congress, alludes remotely and only impliedly, to the fact that slavery existed in any of the States. The representative population was to be "determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." No duty or obligation was imposed on the States; nor is there the remotest sanction or recognition of slaves as property, outside of the range of the territorial laws which treat them as such. The third provision is simply a consent of the States as parties to the Federal compact to the reclamation of fugitives from service. In speaking of this clause, Judge Story said, in delivering the opinion of the Supreme Court of the United States, in (*Prigg vs. Com. of Pennsylvania*) "by the general laws of nations, no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is a matter of comity and not as a matter of international right. The state of slavery is deemed to be a municipal regulation founded upon and limited to, the range of the territorial laws. This was fully recognized in *Sommersett's case*, which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different States. . . . The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity." The learned judge was right in saying that the clause as it stands in the instrument, was adopted with entire unanimity; but it was not adopted as originally reported. There were many eminent and patriotic men in and out of the convention, both north and south, that did not contemplate that slavery was to be perpetual in any of the States of the Union, and amongst these was the illustrious presiding officer of the convention from Virginia. It was certainly inconsistent with the principle that lies at the foundation of our government. In incorporating the fugitive slave provision in the Constitution, the convention was careful not to do anything which should imply its sanction of slavery as legal. The provisions as originally reported, read, "legally held to service," and it was amended by striking out the word "legally" and made to read "held to service or labor in one State, under the laws thereof." (*Vide Journal 384; Madison's works, 1588, 1589.*)

So, also, the word "service" was substituted for "servitude," on notion of a delegate from Virginia; the latter being descriptive of slaves. (*3 Madison's Works, 1569.*) The term "slave" is not used in the Constitution, and if the phrase "a person held to service or labor in one State under the

laws thereof," is to be construed as meaning slaves, then the Federal Constitution treats slaves as persons and not as property, and it acts upon them as persons and not as property, though the latter character may be given to them by the laws of the States in which slavery is tolerated. It is entirely clear that the Convention was averse to giving any sanction to the law of slavery, by an express or implied acknowledgment that human beings could be made the subject of property; and it is moreover manifest, from all the provisions of the Constitution, and from contemporaneous history, that the ultimate extinction of slavery in the United States, by the legislation and action of the State governments (instead of adopting or devising any means or legal machinery for perpetuating it), was contemplated by many of the eminent statesmen and patriots who framed the Federal Constitution, and their contemporaries, both North and South. The provision in relation to fugitives from service is the only one in the Constitution that, by any intendment, supports the right of a slave-owner in his own State, or in another State. This, by its terms, is limited to its special case, and necessarily excludes Federal intervention in every other. This has been always so regarded by the Federal Courts; and the cases uniformly recognize the doctrine, that both the Constitution and laws of the United States, apply only to fugitives escaping from one State and fleeing to another; that beyond this the power over the subject of slavery is exclusively with the several States, and that their action cannot be controlled by the Federal Government. Indeed, the exclusive right of the State of Missouri to determine and regulate the *status* of persons within her territory, was the only point in judgment in the *Dred Scott* case, and all beyond this was *obiter*. (Ex parte Simmons, 4 Wash. C. C. Rep., 396; *Groves vs. Slaughter*, 15 Peters, 598; *Strader vs. Graham*, 10 Howard, 92). Any other doctrine might prove more disastrous to the *status* of slavery than that of Liberty in the States, for, from the moment that it is conceded that by the exercise of any powers granted in the Constitution to the Federal Government, it may rightly interfere in the regulation of the social and civil condition of any description of persons within the territorial limits of the respective States of the Union, it is not difficult to foresee the ultimate result.

The provision of the Federal Constitution conferring on Congress the power to regulate commerce among the several States, is now invoked as a restraint upon State action. It is difficult to perceive how this provision can have any application to the case under consideration. It is not pretended that the persons claimed to be held as slaves were in transit to Texas as articles of commerce; nor that, being with their alleged owner, on board a coasting vessel, enrolled and licensed under the laws of Congress, such vessel was driven by stress of weather or otherwise, into the navigable waters of the State. Indeed, the case showed that their owner had voluntarily brought them into the State; that taking passage from Norfolk to New York, his and their voyage in the coasting steamer had terminated, and he was sojourning in the city with them, awaiting the opportunity to start on a new voyage to Texas. It is certainly not the case of the owner of slaves, passing from one slave State to another, being compelled by accident or distress, to touch or land in this State. In such case, probably, our law would not act upon the *status* of the slave, not being within its spirit and intention; but as Congress has not yet undertaken to regulate the internal slave trade, even if it has authority to do so, in no just sense could even such a case be said to raise the question of the right of Federal intervention. But in no view can the provision empowering Congress to regulate commerce among the States, affect the power of the respective States over the subject of slavery. Even those who have contended for the right in Congress, under the commercial power, as it is called, to regulate the traffic in slaves, among the several States, admit that it is competent for a State, with the view of effectuating its system of policy in the abolition of slavery, to entirely prohibit the importation of slaves, for any purpose, into

her territory. But apart from effectuating any object of policy or promoting any rule of policy, the power over the whole subject is with the States respectively; and this was so declared by the Supreme Federal Court, in *Groves vs. Slaughter*, (15 Peters, 508,) a case in which it was attempted to be urged that a provision in the Constitution of Mississippi prohibiting the importation of slaves into that State for sale, was in conflict with the commercial power of the Federal Government. As was said by Chief Justice Taney, in that case, "each of the States has a right to determine for itself whether it will or will not allow persons of this description (slaves) to be brought within its limits from another State, either for sale or for any other purpose, and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States."

The case of *Groves vs. Slaughter* was deemed, at the time, to have settled the question against the right in Congress, under the commercial claim, to regulate the internal slave trade or to interfere in any way with the power of the States to severally protect themselves, under any and all circumstances, against an external evil. The constitutional provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," (U. S. Con., Art. 4, § 2, sub. 1) is also invoked as having some bearing on the question of the appellant's right. I think this is the first occasion in the juridical history of the country that an attempt has been made to torture this provision into a guaranty of the right of a slave-owner to bring his slaves into, and hold them for any purpose in a non-slaveholding State. The provision was always understood as having but one design and meaning, viz.: to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an alien or enemy in the particular sovereignty. Prior to the adoption of the Federal Constitution, and even under the Confederation, the only kind of citizenship was that which prevailed in the respective States. The articles of confederation provided "that the free inhabitants of each of the States, (paupers, vagabonds, and fugitives from justice excepted,) should be entitled to all privileges and immunities of free citizens in the several States; and the people of each State should have free ingress and regress to and from any other State, and should enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively." (Art. 4.) This article limited the right to the free inhabitants of the States, implying that there were inhabitants of the States in the Confederacy that were not free, and to whom the privileges and immunities were not extended. But when the framers of the Constitution came to remodel this clause, having conferred exclusive power upon the Federal Government to regulate commercial intercourse, and imposed the obligation upon the States, respectively, to deliver up fugitives escaping from service, and being unwilling even impliedly to sanction, by Federal authority, the legality of the state of slavery, they omitted the provisions of the article in relation to commercial intercourse, and substituted for the words, "the free inhabitants of each State," the words, "the citizens of each State," and made the provision to read as it now stands in the Constitution. If the provision can be construed to confer upon a citizen of Virginia the privilege of holding slaves in New York, when there is no law to uphold the *status*, and the privilege is denied to our own citizens, then Judge Story and the Federal Court, fell into a grave error in the opinion.

that if it were not for the fugitive slave provision, New York would have been at liberty to have declared free, all slaves coming within her limits, and have given them entire immunity and protection; and so, also, did Ch. J. Taney mistake the character of the instrument, when declaring that there was nothing in the Constitution to control the action of a State in relation to slavery within her limits. But it seems a work of supererogation to pursue this inquiry. It never yet has been doubted that the sovereign powers vested in the State governments remain intact and unimpaired, except so far as they are granted to the government of the United States; and that the latter government can claim no powers which are not granted to it by the Constitution, either expressly or by necessary implication. There is no grant of power to the Federal Government, or no provision of the Constitution from which any can be implied over the subject of slavery in the States, except in the single case of a fugitive from service. The general power is with the States, except that it has been specially limited by the Federal Constitution; and this special limitation has been rightly considered as a forcible implication in proof of the existence of the general power in the States. So it was considered in *Lunsford vs. Coquiellon* (14 Martin's R., 403) a case arising in a slaveholding State, in which the authority of States was fully recognized to make laws dissolving the relation of master and slave. Such a construction of the Constitution and the law of the United States, say that Court, can work injury to no one, for the principle acts only on the willing, and *volenti non fit injuria*.

3. Is the State, upon principles of comity, or any rule of public law, having force within the State, required to recognize and support the relation of master and slave, between strangers sojourning in or passing through her territory? The relation exists, if at all, under the laws of Virginia, and it is not claimed that there is any paramount obligation resting on this State to recognize and administer the laws of Virginia within her territory, if they be contrary or repugnant to her policy or prejudicial to her interests. She may voluntarily concede that the foreign law shall operate within her jurisdiction and to the extent of such concession, it becomes a part of her municipal law. Comity, however, never can be exercised in violation of our own laws; and in deciding whether comity requires any act, we look to our own laws for authority. There can be no application of the principles of comity when the State absolutely refuses to recognize or give effect to the foreign law, or the relation it establishes, as being inconsistent with her own laws, and contrary to her policy. The policy and will of the State in respect to the toleration of slavery, in any form, or however transient the stay, within her territory, has been distinctly and unmistakably expressed. Before the repealing act of 1841, our statutes operated to absolutely dissolve the relation of master and slave, and make the latter a freeman, except in the case of a master and slave, inhabitants of another State, temporarily in, or passing through the State. In the latter cases, though the master could obtain no affirmative aid from the municipal law to enforce restraint of the liberty of the slave, yet the State, exercising comity, expressly permitted the relation to exist for the space of nine months. To this extent the State consented that the foreign law of slavery should have effect within her limits, and the relation of master and slave was not to be dissolved by force of the municipal law, unless the stay was continued beyond nine months. There can be no doubt that without this express exception, the statute of 1830 would have enacted directly upon the *status* of any slave brought voluntarily into the State, and made him a freeman. As a matter of comity, however, the will of the State then was, that in the case of an inhabitant of another State, passing through our territory with his slaves, the *status* of the latter should not be affected by our laws. But, in 1841, the State, by actual legislation, abrogated the permission accorded to slavery during transit, and declared it to be her will that, under all circumstances, a slave voluntarily brought into the State, should be free, and that the *status* should not be tolerated within her borders. It is for the

State to establish the rule, and exercise comity, and not the Courts in her behalf, and she may, or may not, as she chooses, exercise it. The Courts have but the power of determining whether the comity inquired of, be indicated by her policy and actual legislation. The State has declared, through her legislature, that the *status* of African Slavery shall not exist, and her laws transform the slave into a freeman, the instant he is brought voluntarily upon her soil. Her will is that neither upon principles of comity to strangers passing through her territory, nor in any other way, shall the relation of slave-owner and slave be upheld or supported. Instead, therefore, of recognizing or extending any law of comity, toward a slave-owner, passing through her territory with his slaves, she refuses to recognize or extend such comity, or allow the law of the sovereignty which sustains the relation of master and slave, to be administered as a part of the law of the State.—She says, in effect, to the foreign slave-owner, if you bring your slaves within the State, on any pretence whatever, neither by comity nor in any other way, shall the municipal law let in and give place to the foreign law; but that the relation established and sustained only by the foreign municipal law shall terminate, and the persons before held as slaves, shall stand upon her soil in their natural relations as men and freemen. It is conceded that she may go to this extent if there be no restraint on her action by the Federal Constitution; and to this extent, I think, her policy and actual legislation clearly indicate that she has gone. But if there were no actual legislation reaching the case of slavery in transit, the policy of the State would forbid the sanction of law and the aid of public force to the proscribed *status* in the case of strangers within our territory. It is the *status*, the unjust and unnatural relation which the policy of the State aims to suppress, and her policy fails, at least, in part, if the *status* be upheld at all. Upon the same rule that she would permit the Virginia lady in this case to pass through her territory with slaves, she would be constrained to allow the slave-trader, with his gang, to pass even at the risk of public disorder, which would inevitably attend such a transit. The State deems that the public peace, her internal safety, and domestic interests require the total suppression of a social condition that violates the law of nature: (Virginia Bill of Rights, § 1, 15,) a *status* declared by Lord Mansfield, in *Sommersett's case*, to be “of such a nature that it is incapable of being introduced on any reasons, moral or political;” that originates in the predominance of physical force, and is continued by the mere predominance of a social force, the subject knowing or obedient to no law but the will of the master, and all of whose issue is involved in the misfortune of the parent: a *status* which the law of nations treats as resting on force against the right, and finding no support outside of the municipal law which establishes it. (Taylor's Elements of Civil Law, 429; *Sommersett's case*, 20; Howell's State Trials, 2; 2 Deveraux's Rep., 263.)

Why should not the State be able to utterly suppress it within her jurisdiction? She is not required by the rule of the law of nations which permits the transit of strangers, and their property, through a friendly State, to uphold it. Men are not the subject of property by such law, nor by any law, except that of the State in which the *status* exists; not even by the Federal Constitution, which is supposed by some to have been made only to guard and protect the rights of a particular race, for in that, human beings, without regard to color or country, are treated as persons and not as property. The public law exacts no obligation from this State to enforce the municipal law which makes men the subject of property; but by that law, the strangers stand upon our soil in their natural condition as men. Nor can it be justly pretended that by the principle which attributes to the law of the domicile the power to fix the civil status of persons, any obligation rests on the State to recognize and uphold within her territory the relation of slave-owner and slave between strangers. So far as it may be done without prejudice to her domestic interests, she may be required to recognize the consequence of the *status* existing abroad in reference to subjects within her own

jurisdiction; and when it is brought within her limits, and is there permissible as a domestic regulation, to recognize the foreign law as an authentic origin and support of the actual *status*, (Story's Conflict of Laws, §§ 51, 89, 96, 113, 114, 104, 620, 624.) But no farther than they are consistent with her own laws, and not repugnant or prejudicial to her domestic policy and interests, is the State required to give effect to these laws of the domicile.

My conclusions are, that legal cause was not shown for restraining the colored persons, in whose behalf the writ of Habeas Corpus was issued of their liberty; and that they were rightly discharged. I have aimed to examine the question involved in a legal and not in a political aspect; the only view, in my judgment, becoming a judicial tribunal to take. Our laws declare these to be free; and there is nothing which can claim the authority of law within this State, by which they may be held as slaves. Neither the law of nature or nations, or the Federal Constitution impose any duty or obligation on the State to maintain the state of slavery within her territory, in any form or under any circumstances, or to recognize and give effect to the law of Virginia, by which alone the relation exists, nor does it find any support or recognition in the common law.

The judgment of the Supreme Court should be affirmed.

DAVIES, BACON and WELLES, JJ., concurred.

OPINION OF MR. JUSTICE CLERKE, DISSENTING.

CLERKE J., dissenting. A considerable proportion of the discussion in this case was occupied by observations, not at all necessary to a proper disposition of it; nor were they calculated in the slightest degree, in my opinion, to aid the Court in solving the question presented for its determination. Whether slavery is agreeable, or in opposition to the law of nature, whether it is morally right or wrong, whether it is expedient, or inexpedient, whether the African race are adapted by their physical and moral organization only to this condition, whether they can be induced to labor only by compulsion, whether the fairest and most fertile portions of the earth—those lying near and within the tropical zones—can only be cultivated to any extent by that race, and whether if without their labor, therefore, this large portion of the globe will, contrary to the manifest design of the Creator, continue or become a sterile waste, are questions very interesting within the domain of theology or ethics, or political economy—but totally inappropriate to the discussion of the purely legal questions now presented for our consideration. Those questions are, 1st. Whether the Legislature of this State has declared that all slaves brought by their masters into it under any circumstances whatever, even for a moment, shall be free; and 2d, if it has so declared, had they the constitutional power to do so.

I. The act passed in 1817, and reenacted in 1830, declares that no person, held as a slave, shall be imported, introduced or brought into this State, on any pretence whatsoever, except in the cases therein specified, and that every such person shall be free. One of the excepted cases allowed a person, not an inhabitant of this State, travelling to or from, or passing through it, to bring his slave here and take him away again, but if the slave continued here more than nine months, he should be free. These exceptions were repealed by an act passed May 25, 1841, amending the Revised Statutes, in relation to persons held in slavery. Although there appears to be no ambiguity in the language of those acts, I am not surprised that some incredulity has been expressed in relation to their entire meaning. What, it may be plausibly asked, could be the object of the Legislature in interfering with persons passing through our territory? It is not to be supposed *a priori*, that any one member of the brotherhood of States would adopt any legislation for the purpose of affecting persons, with whom, as a social

or political community, it has no possible concern. If the slave were to remain here for any time, legislators may, indeed, fear some detriment, some demoralization from his presence, but what could the most nervous or fastidious guardians of the public interest apprehend from persons passing through the State. Neither could it add one jot or one tittle to the sum of slavery in the world. To suppose, therefore, it may be said, that the acts referred to, aimed at such persons, would be imputing a spirit of the most wanton aggression to the legislators who passed them. It would be mere propagandism, of which we should not suppose any community capable who were not in a condition of revolutionary excitement and fanatical exaltation, like that of the French people, during their first revolution, when they undertook to force their theories of spurious democracy on the other nations of Europe, disturbing its peace for more than twenty years, and causing wide-spread slaughter and desolation. But, notwithstanding all these reasons, which may be plausibly suggested in considering the intent of the Legislature, the language of the acts referred to, is too plain to admit of any doubt of that intent. It evidently intended to declare that all slaves voluntarily brought into this State, under any circumstances whatever, should become instantly free.

II. But it is a question of much greater difficulty, whether they had the Constitutional power to do so.

New York is a member of a confederacy of free and sovereign States, united for certain specific and limited purposes, under a solemn written covenant. And this covenant not only establishes a confederacy of States, but also, in regard to its most material functions, it gives it the character of a homogeneous national government. The Constitution is not alone federal, or alone national; but, by the almost divine wisdom, which presided over its formation, while its framers desired to preserve the independence and sovereignty of each State within the sphere of ordinary domestic legislation, yet they evidently designed to incorporate this people into one nation, not only in its character as a member of the great family of nations, but also as to the internal, moral, social and political effect of the Union upon the people themselves. It was essential to this grand design, that there should be as free and as uninterrupted an intercommunication between the inhabitants and citizens of the different States as between the inhabitants and citizens of the same State. The people of the United States, therefore, "in order to form a more perfect union" than had existed under the old confederacy, declare and provide among other things in the Constitution, under which we have now the privilege of living, that Congress (alone) shall have power to regulate commerce among the several States, to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, to coin money as the genuine national circulating medium, to regulate its value, to fix the standard of weights and measures, to establish post offices and post roads, to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. It also provides that no tax or duties shall be laid on articles exported from any State, and that no preference shall be given, by any regulation of commerce, or revenue, to the ports of one State over another, that vessels bound to or from one State shall not be obliged to enter, clear or pay duties in another; that full faith or credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State, and that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. The people, in adopting this Constitution, declare, in its very preamble, that they intended to form a more perfect union than had bound them under the old articles of confederation, the fourth article of which declares, that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States, the free inhabitants of each State should be entitled to all the privileges and immuni-

ties of free citizens in the several States. That the people of each State should have free ingress to and from any other State, and should enjoy therein all the privileges of trade and commerce, as the inhabitants thereof respectively, subject to the same duties, impositions and restrictions; provided that these restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State, of which the owner is an inhabitant. Most assuredly the people who adopted the present Constitution did not intend that the intercourse between the people of the different States should be more limited or restricted than the States, in their corporate capacity, provided in the articles of confederation. On the contrary, they contemplated, as we have seen, a more perfect union, and a more perfect and unrestricted intercourse; and they amply secured it by the provisions to which I have referred.

Is it consistent with this purpose of perfect union and perfect and unrestricted intercourse, that property which the citizen of one State brings into another, for the purpose of passing through it to a State where he intends to take up his residence, shall be confiscated in the State through which he is passing, or shall be declared to be no property and liberated from his control? If he, indeed, brings his property voluntarily, with the design of taking up his residence in another State, or sojourning there for any purpose of business, even for a brief period, he subjects himself to the legislation of that State, with regard to his personal rights and the rights relating to property.

By the law of nations, the citizens of one government have a right of passage through the territory of another, peaceably, for business or pleasure; and the latter acquires no right over such person or his property. This privilege is yielded between foreign nations towards each other without any express compact. It is a principle of the unwritten law of nations.

Of course this principle is much more imperative on the several States than between foreign nations in their relation toward each other. For, it can be clearly deduced, as we have seen from the compact, on which their union is based. Therefore, making this principle of the law of nations, applicable to the compact, which exists between the several States, we say, that the citizens of any one State have a right of passage through the territory of another, peaceably, for business or pleasure; and the latter acquires no right over them or their property. But, the Judge, who decided this case in the first instance, by whose reasoning I may be permitted here to say, I was erroneously influenced in voting at the General Term of the Supreme Court in the First District, while admitting the principle of the law of nations, which I have quoted, says, that the property, which the writers on the law of nations speak of, is merchandise or inanimate things, and that the principle, therefore, is not applicable to slaves, who by the law of nature and of nations, he contends cannot be property. Foreign nations, undoubtedly, between whom no express compact exists, are at liberty to make this exception. But can any State of this Confederacy, under the compact, which unites them, do the same? Can they make this distinction? In other words, can any one State insist, under the federal compact, in reference to the rights of the citizens of any other State, that there is no such thing as the right of such citizens, in their own States, to the service and labor of any person. This is property; and, whether the person is held to service and labor for a limited period, or for life, it matters not; it is still property—recognized as an existing institution by the people, who framed the present Constitution, and binding upon their posterity forever, unless that Constitution should be modified or dissolved by common consent.

The learned Judge who rendered the decision in the first instance in this case would, of course, admit on his own reasoning, that, if by the law of nations, the right was recognized to property in slaves, the principle would

apply to that species of property, as well as to any other, and its inviolability would be upheld whenever its owner was passing with it through any territory of the family of nations. Can it be disputed that the obligations of the States of this Union toward each other are less imperative than those of the family of nations would be toward each other, if a right to this species of property were recognized by the implied compact, by which their conduct is regulated. The position, therefore, of the learned Judge, and of the General Term, can only be maintained on the supposition, that the compact which binds the States together does not recognize the right to the labor and service of slaves as property, and that each State is at liberty to act toward other States, in this matter, according to its own particular opinions in relation to the justice or expediency of holding such property. It may be, therefore, necessary more particularly, though briefly, to inquire, what were and what had been the circumstances of the original States, in relation to this subject, at the time of the adoption of the present Constitution, what was the common understanding in relation to it, as pointed out by the debates in the Convention, and what does the Constitution itself, by express provisions or necessary implication, indicate on this ever-important subject.

When this Constitution was adopted, by the deliberate consent of the States, and the people, slavery existed in every State, except Massachusetts and New Hampshire. It had existed in all the New England Colonies from a very early period. The four Colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven, had formed a confederation, in which, among other things, they had stipulated with each other, for the restoration of runaway servants, "and," to employ the language of Mr. Curtis (*History of the Constitution of the United States*, 2d vol., 453-4 p.), "there is undoubted evidence that African slaves, as other persons in servitude, were included in this provision. Slavery in Massachusetts had not been confined to Africans, but included Indians, captured in war, and persons of our race condemned for crimes. The early colonists of Massachusetts, held and practised the law of Moses." "They regarded it," says the same writer, in a note, "as lawful to buy and sell slaves, taken in lawful war, or reduced to servitude by judicial sentence, and placed them under the same privileges as those given by the Mosaic law."

Slavery had not only existed for a long period in all the colonies, but at the time of the formation of the Constitution it was likely to continue to exist for a long time, in the greater number of the States. In five of them, the slave population, composed of the African race, was very numerous, while, in other States, they were comparatively few. It was in this condition of things, that the Representatives of the States assembled to frame a Constitution for their more perfect union, and for the common preservation of their rights not only from external attacks, but from internal aggression. Their deliberations began with the conviction and acknowledgment that property in slaves, existed to a great extent, in nearly all the States; and soon it became necessary to consider whether the slave population should be included in the ratio of representation. They must be regarded in order to make a satisfactory provision on this subject, indispensable to the completion of the Constitution, either as persons, or chattels, or as both. "In framing the new Union, it was equally necessary, as soon as the equality of the representation by States, should give place to a proportional and unequal representation, to regard the inhabitants in one or the other capacity, or in both capacities, or leave the States in which they were found, and to which their position was a matter of grave importance, out of the Union." (*Curtis' History of the Constitution of the United States*, 20, 22). And what was the result of those convictions and deliberations? Undoubtedly, that while slavery should be deemed a local institution, depending upon the power of each State to determine what persons should share the civil and political rights of the community, the right is fully recognized in the Constitution.

that any of the States may continue and allow the right of property in the labor and service of slaves.

The portions of the Constitution more directly bearing on this subject, are the 3d subdivision of the 2d section of the 1st article, and the 3d subdivision of the 2d section of the 4th article. The former relates to the apportionment of representatives and direct taxes necessarily compelling a discrimination between the different classes of inhabitants. It was contended, on behalf of some of the Northern States, that slaves ought not to be included in the numerical rule of representation. Slaves, it was contended, are considered as property, and not as persons, and therefore ought to be comprehended in estimates of taxation, which are founded on property, and to be excluded from representation, which is regulated by a census of persons. The representatives of the Southern States, on the other hand, contended that slaves were not considered merely as property, but that they were also considered as persons; and Mr. Jay, in his paper on this subject in the *Federalist*, which, recollect, was published before the submission of the Constitution for ratification by the States, says: "The true state of the case is that they partake of both these qualities, being considered by our laws in some respects as property." "The Federal Constitution," he adds, "therefore decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and property."

But in addition to this, if anything can be necessary, it has been adjudicated in the celebrated *Dred Scott* case, in a court whose decisions on this subject are controlling, that the Constitution of the United States recognizes slaves as property, and this is an essential element of the decision. Chief Justice Taney, who delivered the opinion of the Court, says:

"The only two provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, may require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate case, in the civilized nations of Europe or in this country, should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself, by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make it the mere reflex of the popular opinion or passion of the day. The Court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty."

Moreover, besides the necessary implication from the avowed purpose of the 3d subdivision of the 2d section, article 1st of the National Constitution,

the language itself recognizes the condition of slavery. It says: "Representatives and direct taxes shall be apportioned among the several States, which shall be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to a service for a term of years, and excluding Indians, not taxed, three-fifths of all other persons. What other persons? The words are employed in direct contrast to free persons, and indisputably mean persons not free. It has been asserted, with an air of triumph, that the word "slave" is not employed in the Constitution; this was a matter of taste, I suppose, about which the members of the convention did not think it worth while to contend. They had a higher and more practical purpose than to indulge any strife about a word: they were dealing with things, with realities; and instead of calling those "slaves," who, in the apportionment of representatives and direct taxes, were to be added to free persons, they call them "other persons"—of course persons not free.

If then, by the law of nations, the citizen of one government has a right of passage with what is recognized as property by that law, through the territory of another peaceably, and that too without the latter's acquiring any right of control over the person or property, is not a citizen of any State of this confederacy entitled under the compact upon which it is founded, to a right of passage through the territory of any other State, with what that compact recognizes as property, without the latter's acquiring any right of control over that property.

Surely, this compact of sovereignties is not less obligatory on the parties to it, than is the law of nations on those who are subject to it. Is the one in derogation of the other? or does it not rather magnify and render more precise and tangible and greatly extend, the duties and obligations imported by the law of nations? This inviolability of slave property of the citizens of other States, while passing through the territory of free States, in analogy to the principle of the law of nations, to which I have adverted, clearly in no way interferes with the supreme authority of each State over those persons and things that come within the range of its dominion. By universal law, every sovereign State has supreme dominion over every person and thing within its territory, not there for the purpose of passing through it, or not there in the capacity of ambassadors from foreign nations, or their servants.

But, it is asserted, that the privilege, accorded to the citizens of one foreign nation to pass unmolested with their property through the territory of any other, is founded merely on comity. If by this is meant, that the nation, within whose territory the property of a stranger is confiscated, is not responsible for its acts in that respect, the idea is incorrect. Such an act would be a valid cause for a resort to the only method by which nations can obtain redress after remonstrance or negotiation fails; but if it is meant that these words import that the judicial tribunals can only administer the law as declared by the law-making power of their own particular nation, and the injured nation can only seek peaceable redress by appealing to the Executive, and through it, to the law-making power, the proposition is correct. But, as I have shown, the relations of the different States of this Union toward each other are of a much closer and more positive nature than those between foreign nations toward each other. For many purposes they are one nation; war between them is legally impossible; and this comity impliedly recognized by the law of nations, ripens, in the compact, cementing these States, into an express conventional obligation, which is not to be enforced by an appeal to arms, but to be recognized and enforced by the judicial tribunals.

The error into which the Judge, who decided this case in the first instance, fell, consisted in supposing, because the law of nations refused to recognize slaves as property, the several States of this Union were at liberty to do the same; forgetting that the compact, by which the latter are governed in their

relations toward each other, modifies the law of nations in this respect; and while each particular State is at liberty to abolish or retain slavery in reference to its own inhabitants and within its own borders, as its sense of right or expediency may dictate, it is not permitted, in its dealings or intercourse with other States, or their inhabitants, to ignore the right to property in the labor and service of persons, *in transitu* from those States.

The Supreme Court having fallen into the same error, their order should be reversed.

To avoid the possibility of misapprehension, I will briefly recapitulate the positions which I hold in the foregoing opinion.

Every State is at liberty, in reference to all, who come within its territory, with the intent of taking up their abode in it for any length of time, to declare what can, or cannot, be held as property.

As, however, by the law, or implied agreement which regulates the intercourse of separate and independent nations toward each other, all things belonging to the citizens of any one nation, recognized as property by that law, are exempt in their passage through the territory of any other, from all interference and control of the latter; so, *a fortiori*, by the positive compact, which regulates the dealings and intercourse of these States toward each other, things belonging to the citizen of any one State, recognized as property by that compact, are exempt in their passage through the territory of any other State, from all interference and control of the latter.

The right to the labor and service of persons, held in slavery, is incontestably recognized as property in the Constitution of the United States.

The right yielded by what is termed comity, under the law of nations, ripens, in necessary accordance with the declared purpose and obvious tenor of the Constitution of the United States, into a conventional obligation, essential to its contemplated and thorough operation as an instrument of federative and national government.

While the violation of the right yielded by what is termed comity, under the law of nations, would, under certain circumstances, be a just cause of war, the rights growing out of this conventional obligation, are properly within the cognizance of the judicial tribunals, which they are bound to recognize and enforce.

That portion of the act of the legislature of this State, which declares that a slave brought into it, belonging to a person not an inhabitant of it, shall be free, is unconstitutional and void, so far as it applies to a citizen of any other State of this Union, where the right to property in the service and labor of slaves exists, who is passing through this State, and who has no intention of remaining here a moment longer than the exigencies of his journey require.

COMSTOCK, Ch. J.—Observed in substance, that since the last term of the Court, his time had been wholly occupied in an examination of other causes argued at that term. To this case, therefore, he had not yet been able to give the attention which its importance might justify. He had no hesitation in declaring it to be his opinion that the legislation of this State, on which the question in the case depends, is directly opposed to the rules of comity and justice, which ought to regulate intercourse between the States of this Union; and he was not prepared to hold that such legislation does not violate the obligations imposed on all the States by the Federal Constitution. Without, however, wishing to delay the decision which a majority of his brethren were prepared to make, he contented himself with dissenting from the judgment.

SELDEN, J.—I have been prevented by want of time, and the pressure of other duties, from giving to this case that careful examination which is due to its importance, and to the elaborate and able arguments of the Counsel, and am not prepared, therefore, definitely to determine whether the act of 1841 is or is not in conflict with any express provisions of the United States Constitution. But, however this may be, I cannot but regard it as a gross violation of those principles of justice and comity, which should at all times pervade our inter-State legislation, as well as wholly inconsistent with the general spirit of our national compact. While, therefore, I am not prepared at this time to give such reasons as would justify me in holding the law to be void, I am equally unprepared to concur in the conclusion to which the majority of my associates have arrived.

THE END.

